(P)

No. 06-5618

Title: Mario Claiborne, Petitioner
v.
United States

Docketed: August 1, 2006
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (05-2198)
Decision Date: February 27, 2006
Rehearing Denied: April 27, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 26 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 31, 2006)
Aug 10 2006	Waiver of right of respondent United States to respond filed.
Aug 17 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 14 2006	Response Requested . (Due October 16, 2006)
Sep 29 2006	Brief of respondent United States in opposition filed.
Oct 11 2006	DISTRIBUTED for Conference of October 27, 2006.
Oct 24 2006	Reply of petitioner Mario Claiborne filed. (Distributed)
Oct 30 2006	DISTRIBUTED for Conference of November 3, 2006.
Nov 3 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following Questions: 1) Was the district court's choice of below-Guidelines sentence reasonable? 2) In making that determination, is it consistent with United States v. Booker, 543 U. S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?
Dec 6 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner
Dec 7 2006	Motion to file Volume II of the joint appendix under seal. filed by petitioner Mario Claiborne.
Dec 18 2006	SET FOR ARGUMENT ON Tuesday, February 20, 2007.
Dec 18 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
Dec 18 2006	Brief amicus curiae of Families Against Mandatory Minimums filed. VIDED.
Dec 18 2006	Brief amici curiae of The Sentening Project, et al. filed.
Dec 18 2006	Brief amicus curiae of New York Council of Defense Lawyers filed.
Dec 18 2006	Brief of petitioner Mario Claiborne filed.
Dec 18 2006	Brief amici curiae of Law Professors Who Study Sentencing Reform filed. VIDED.
Dec 18 2006	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.
Dec 18 2006	Brief amici curiae of Federal Public and Community Defenders, et al. filed. VIDED.
Dec 18 2006	Joint appendix Volume I filed.
Dec 20 2006	Motion DISTRIBUTED for Conference of January 5, 2007.
Jan 5 2007	Motion to file Volume II of the joint appendix under seal. GRANTED.
Jan 10 2007	CIRCULATED.
Jan 19 2007	Record received from U.S.C.A. for Eighth Circuit.

Jan 22 2007	Brief of respondent United States filed. (Distributed),
Jan 22 2007	Brief amicus curiae of United States Sentencing Commission filed. VIDED. (Distributed)
Jan 22 2007	Brief amici curiae of Senators Edward M. Kennedy, et al. filed. (Distributed)
Feb 10 2007	Record received from U.S.D.C. for the Eastern District of Missouri. (1 box) There are sealed documents in this record.
Feb 12 2007	Reply of petitioner Mario Claiborne filed. (Distributed)
Feb 20 2007	Argued. For petitioner: Michael Dwyer, Assistant Federal Public Defender, St. Louis, Mo. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

CASE NO. 06-5618

ORIGINAL

SUPREME COURT OF THE UNITED STATES
October 2005 Term

Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

Submitted on Behalf of Petitioner

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory use of the United States Sentencing Guidelines violated the Sixth Amendment right to a jury trial of any fact required to enhance a criminal sentence. The Court remedied the error by making the Guidelines "effectively advisory", one of many factors a court considers in choosing a sentence under 18 U.S.C. § 3553(a). The Court also prescribed appellate review of sentences for "reasonableness" in light of all the section 3553(a) factors and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based this "reasonableness" standard paid "substantial deference" to a sentencing judge's discretionary choices in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81, 98 (1996).

In light of the foregoing, these issues are presented:

1. Does an appellate court make the Sentencing Guidelines effectively mandatory by granting a presumption of reasonableness to the Guidelines range, rather than granting deference to the sentencing judge's decision in light of all the section 3553(a) factors?

2. Does granting a presumption of reasonableness to the guidelines range deny the substantial deference granted a district court's discretionary sentencing decision under the "reasonableness" standard chosen in *Booker*?

PARTIES

The petitioner, Mario Claiborne, has at all times been represented by Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, 1010 Market, Suite 200, Saint Louis, Missouri, 63101, and Michael Dwyer, Assistant Federal Public Defender in the same office. The United States is represented by United States Attorney Catherine Hanaway, Eastern District of Missouri, and Assistant United States Attorney Cristian M. Stevens, 111 South Tenth Street, Saint Louis, Missouri, 63102.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 439 F.3d 479 (8th Cir. 2006). A copy of the Eighth Circuit's original slip opinion appears at pages 1-4 of the Appendix to this petition.

JURISDICTION

Petitioner seeks review of the judgment issued by the Eighth Circuit Court of Appeals on February 27, 2005, reversing petitioner's sentence and remanding the case for resentencing. Appendix, p. 1. Petitioner filed a motion for rehearing and for rehearing *en banc*. The court of appeals denied the petition for rehearing on April 27, 2006, with two members of the Eighth Circuit dissenting from the denial of rehearing. Appendix, p. 5. This petition for certiorari is timely filed within ninety-days of the ruling on the petition for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS

The applicable constitutional provision is Amendment VI to the United States Constitution, which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." US. Const. Amend. VI.

STATUTORY PROVISIONS:

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. . . . [A] person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance

exceeds 5 grams . . . .

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for–

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines–

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments

made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by at of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.–

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses – [omitted].

18 U.S.C. § 3742. Review of a sentence

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that–

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(c) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

STATEMENT OF THE CASE

The government indicted Mario Claiborne on charges that he distributed 0.23 grams of cocaine base in May of 2003, a violation of 21 U.S.C. § 841(a)(1), and possessed 5.03 grams of cocaine base on November 2, 2003, a violation of 21 U.S.C. § 844(a). The latter charge carried a statutory minimum sentence of five years, but the district court found that Claiborne, who had no prior criminal history, qualified for safety-valve relief from that statutory minimum sentence, 18 U.S.C. § 3553(f). The court calculated the advisory sentencing guidelines range at 37 to 46 months, a calculation that neither party has disputed.

Claiborne was twenty-one when he came before the district court for sentencing. Sentencing Tr. p. 21. Defense counsel noted to the district court that Claiborne secured employment within a month of posting bond. *Id.* p. 17. Claiborne complied with the condition that he attend drug counseling while on bond and lived with and supported his girlfriend and their two children, as well as his girlfriend's older child from a prior relationship. Presentence Report pp. 5-6. Counsel also pointed out Claiborne's success supporting his family while on bond and urged the court "to continue the momentum of that success" by sentencing him "considerably lower than what the guidelines would call for." Sentencing Tr. p. 18.

Defense counsel argued that the 37 to 46 month range was too high, noting, among other things, the disparate treatment of cocaine base compared to cocaine powder. Counsel stressed the unreasonableness of the 100:1 drug quantity ratio between powder and crack cocaine employed by the advisory sentencing guidelines and pointed to the conclusions of the United States Sentencing Commission itself that this disparate treatment "cannot be justified." Counsel noted that, had Claiborne been prosecuted for a total of 5.26 grams of cocaine powder rather than cocaine base, the guidelines range would have been 6 to 12 months.

The district court addressed Claiborne and admonished him for engaging in the drug sales on which his prosecution were based:

> . . . Selling drugs is not the way to support yourself. It was not the way to support your family. Because, as you stand here now, you are about to go to prison. You're not going to be able to support your family from prison.
>
> So you need to ask yourself: Is there something else I can do to provide financial support for myself and my family that will not place me in jeopardy of being taken away from them and incarcerated for – but for your being granted these objections – a minimum of 60 months. That's a long time for someone to be sent away from their family.

The judge specifically addressed the guidelines range:

> I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history

which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.

However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.

I don't think that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – much amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

Sentencing Tr. 23-24. The judge imposed concurrent 15-month sentences, plus 3 years of supervised release with drug testing and drug counseling. *Id.* at 25-26.

A panel of the Eighth Circuit Court of Appeals declared the district court's sentence unreasonable. The panel labeled the sentence an "extraordinary variance" because 15 months is 60% of the low end of the guideline range (37 months), and further declared:

> An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially

> reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

Appendix pp. 3-4. The panel made no reference in its opinion to the district court's ruling that sentencing Claiborne to a term within the guideline range "would be tantamount to throwing [him] away." The court of appeals's "fair inference" is wholly unsupported by the record. The only evidence in the record concerned the two counts in the superseding indictment for which Claiborne accepted responsibility. Nothing in the record, including the Presentence Report (PSR), supported any allegation or evidence of any other drug sales.

Petitioner filed a motion for rehearing. He argued that the Eighth Circuit's application of a "presumption of reasonableness" to the guidelines range, and its requirement that district courts provide justification for non-guidelines sentences proportionate to their percentage of variance from the guidelines effectively resurrected the procedure of 18 U.S.C. § 3553(b), stricken by *Booker*. Petitioner also argued that the Court of Appeals' substitution of its own judgment that the

circumstances did not warrant a variance reflected a *de novo* standard of review that conflicted with the "reasonableness" review ordered by this Court in *United States v. Booker*, 543 U.S. 220 (2005). The panel opinion made no mention of the district court's judgment that imprisoning Claiborne for 36-47 months "would be tantamount to throwing [Claiborne] away." The Eighth Circuit denied the petition for rehearing on April. 27, 2006. Appendix, p. 5. Two members of the court dissented from the denial of rehearing. Appendix, p. 5.

REASONS FOR GRANTING THE WRIT

I. The Court should decide whether granting the Sentencing Guidelines range a "presumption of reasonableness" when assessing the reasonableness of a non-guidelines sentence negates *Booker*'s constitutional remedy and produces a *de facto* binding guidelines regime.

> "Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside the Guidelines range? . . . Time may tell . . ."

United States v. Booker, 543 U.S. 220, 313 (2005) (SCALIA, J., dissenting in part)

The reasonableness review developed in the Eighth Circuit answers Justice Scalia's cautionary inquiry with a clear "yes." The circuit reviews non-Guidelines sentences from a premise that the Guidelines established the reasonable range of sentencing. *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), Appendix p. 3. The Eighth Circuit measures reasonableness by examining (1) whether the district court's justification for deviating from the Guidelines is reasonable and (2) whether the extent of the deviation is reasonable. *Id.* This approach shifts the appellate focus from assessing the reasonableness of the district court's stated reasons for the sentence against all the § 3553(a) factors to the limited question of whether the judge reasonably chose to depart from the guidelines range and whether the extent of that guidelines variance was reasonable. The Eighth Circuit's version of "reasonableness" review revives 18 U.S.C. § 3553(b), which

"required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)". *See United States v. Booker*, 543 U.S. at 259.

Further, the Eighth Circuit's presumption that the Guidelines range is reasonable replaces the substantial deference historically granted to a sentencing judge's discretion in resolving the myriad considerations involved in choosing a sentence. *See Koon v. United States*, 518 U.S. 81, 97-99 (1996). That deference played an established role in the pre-2003 appellate review of sentences imposed outside the applicable guidelines range on which this Court modeled the reasonableness review ordered in *Booker*. *See Booker v. United States*, 543 U.S. at 261; *Koon v. United States*, 518 U.S. at 98. Far from granting deference to the district court's discretionary judgment, the Eighth Circuit warns district court judges that the facts in any given case can only ever support a "limited range of choice". *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005).

The Eighth Circuit's guidelines-focused style of reasonableness review conflicts with the appellate review mandated by *Booker* and *Koon*. At least three circuits – the First, Second, and Third – do not employ a presumption of reasonableness in the guidelines range to review non-guidelines sentences. *See* page14 *infra*. This conflict in appellate review invites disparate sentences. *Compare*

United States v. Claiborne, 439 F.3d at 481 (8th Cir.), and *United States v. Williams*, 435 F.3d 1350, 1355 (11th Cir. 2006) (affirming reasonableness of sentence 50% below guidelines range for selling crack cocaine chosen in light of defendant's age, minimal criminal record, and medical condition). Certiorari is warranted to prevent the inevitable sentencing disparities caused by the different circuit approaches to sentencing review.

Booker remedy required "effectively advisory" guidelines, not presumptive guidelines sentencing

The United States Sentencing Guidelines violated the Sixth Amendment right to jury trial because they required judges rather than juries to find facts that led to enhanced sentences. *See United States v. Booker*, 543 U.S. at 245. The constitutional problem arose because judges were essentially bound to impose the guidelines range almost all the time. *See id.* at 259. Section 3553(b) made the guidelines "binding" on judges because it "required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)," 543 U.S. at 259. The fact that the statute allowed judges to impose sentences outside the guidelines range did not render the guidelines advisory, because such departures were not available in every case, "and in fact [were] unavailable in most." 543 U.S. at 234. In effect, the Sentencing Reform Act

that led to the creation of the Guidelines, 18 U.S.C. § 3591 *et seq* (SRA), made the Guidelines the "presumptive" sentencing range that bound judges' sentencing decisions most – but not all – of the time. *Id.*

This Court chose a constitutional remedy intended to render the sentencing guidelines "effectively advisory". *United States v. Booker*, 543 U.S. at 245. The Court sought to achieve this result by (1) eliminating the statutory provision in §3553(b) that required district courts to impose guidelines sentences "in the absence of circumstances that warranted a departure," and (2) by eliminating the appellate review provisions intended to enforce guidelines sentencing (section 3742(e)). *United States v. Booker*, 543 U.S. at 259, 261. In excising section 3553(b), the Court directed that sentencing judges make individual sentencing decisions grounded in all the facts set forth in 18 U.S.C. § 3553(a). *See* 543 U.S. at 245. Sentencing judges must still consider the guidelines range as one such factor, but the constitutional remedy required that judges be free to impose non-guidelines sentences grounded in the other 3553(a) considerations. *Id.* Those factors included "the nature and circumstances of the offense and the history and characteristics of the defendant", the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment", to "protect the public", to provide the defendant with training, care, "or other

correctional treatment in the most effective manner," and the need to avoid unwarranted sentence disparities. 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(A) - (D), 3553(a)(6).

In excising the appellate review provisions of section 3742(e), the Court recognized a surviving right to appellate review of sentences to determine whether they are "unreasonable". *Booker*, 543 U.S. at 261. The Court modeled such review on the reasonableness review previously applied to non-guidelines sentencing according to the pre-2003 version of Section 3742(e). *Id.* Under this standard, appellate courts assess the district court's sentence

> "with a view toward determining whether such a sentence '*is unreasonable*, having regard for . . . the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)], and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)."

United States v. Booker, 543 U.S. at 261, *quoting* 18 U.S.C. § 3742(e)(3) (1994 ed.) (emphasis added in *Booker*).

A significant feature of the new "reasonableness" review "is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)." *Booker*, 543 U.S. at 312 (Scalia, J., dissenting)(emphasis in

original).

Appellate review granting "presumption of reasonableness" in guidelines produces *de facto* "mandatory guidelines"

The Eighth Circuit's guidelines-focused style of review applies the "cookie-cutter" style of appellate review that *Booker* struck down. *Booker* instructed appellate courts to assess criminal sentences against the full range of sentencing factors listed in § 3553(a). *See* 543 U.S. at 261. The Eighth Circuit, instead, reviews both non-guidelines sentences and guidelines sentences alike from a starting presumption that the Guidelines establish the range of reasonable sentencing. *United States v. Claiborne*, 439 F.3d at 481. In fact, the Eighth Circuit demands "extraordinary" justification for any sentence falling fifty percent or more below the minimum guidelines term–whether the actual difference in time amounts to two years, as in Claiborne's case, *see* Appendix at p. 2, or twelve. *See, e.g., United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006) (rejecting sentence that fell 142 months below guidelines floor).

The shift in appellate focus from the reasonableness of a district court's chosen sentence in light of all the section 3553(a) factors to the reasonableness of *not* using the guidelines range and the reasonableness of the degree of guidelines variance, elevates the Guidelines calculation in section 3553(a)(4)(i) above all

other section 3553(a) considerations without any justification in the language or reasoning of *Booker*.

The Eighth Circuit purports to justify the Guidelines' domination of its reasonableness review on the basis that "[t]he Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study." *United States v. Claiborne*, 439 F.3d at 481. That is, the Eighth Circuit treats the Guidelines as the presumptively reasonable amalgamation of all the section 3553(a) factors. To the contrary, the Guidelines say little about "the history and characteristics of the defendant," a primary sentencing factor in section 3553(a). The Guidelines prohibit consideration of many individualized factors, such as lack of guidance as a youth and similar circumstances, drug or alcohol dependence or abuse, aberrant behavior involving drug trafficking, for example. *See* U.S.S.G. §§ 5K2.0(d)(1), 5K2.13, 5K2.20(c); *United States v. Jimenez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez. J., dissenting). In drafting the Guidelines, the Sentencing Commission ignored a defendant's rehabilitative needs, other than requiring judges to assess the need for training and treatment when imposing conditions of probation or supervised release. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("Fifteen

Year Report") at 3 (2004). Furthermore, sentencing judges–unlike the United States Sentencing Commission–bear a statutory mandate to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]." 18 U.S.C. § 3553(a).

The sentencing judge's duty to impose a sentence "sufficient, but not greater than necessary" to serve the § 3553(a) factors played a critical role in the choice of a 15-month sentence for Claiborne. Appendix, pp. 6-7. The judge clearly explained her judgment that imposing a term within the 37 to 46 month guidelines range "would be tantamount to throwing [Claiborne] away." *Id.* The judge's reasoning reflected her concern that the guidelines range would negate the sentencing factors of providing Claiborne with correctional treatment in the most effective manner, and the need to protect the public from future crimes in the absence of such rehabilitation. 18 U.S.C. §§ 3553 (a)(2)(c), 3553(a)(2)(D).

The Eighth Circuit did not suggest that the sentencing court's judgment in this regard was wrong; it simply ignored this concern notwithstanding the critical role it played in the district court's judgment. Appendix, pp. 6-7. The Eighth Circuit resorted to reasoning by declaration, asserting that the guidelines already took into account the district court's concerns about Claiborne's lack of criminal history, and the smallness of the drug quantity involved. Appendix, p. 3-4. The

Eighth Circuit reversed the district court's judgment using essentially the same reasoning it would have employed prior to *Booker*: the district court failed to apply the guidelines in the absence of factors that justified a departure. *Booker*, 543 U.S. at 259, describing §3553(b)(1).

The three circuits that have expressly rejected a "presumption of reasonableness" – the First, Second, and Third circuits – perceived that the practical effect of such presumption would be to revive the binding nature of the guidelines. *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (although making guidelines "presumptive" or reasonable *per se* would not make them mandatory, "it tends in that direction"); *United States v. Fernandez*, 443 F.3d 19, 27 (2nd Cir. 2006) (same); *United States v. Cooper*, 437 F.3d 324, 331 (3rd Cir. 2006) (declaring the guidelines range reasonable *per se* "would come close to restoring the mandatory nature of the guidelines excised in *Booker*"); *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006) (treating guidelines range as presumptive sentence brings the court "perilously close to the mandatory Guidelines regime squarely rejected by the Supreme Court in *Booker*."). The Eighth Circuit's use of such a presumption vindicates the caution expressed by these other jurisdictions.

The Eighth Circuit's adoption of the Guidelines range for cocaine base denied deference to the judge's assessment of the "seriousness of the offense," ignoring the Sentencing Commission's caution that the crack guidelines are not justified

The Eighth Circuit's enforcement of a presumption of reasonableness in the Sentencing Guidelines calculation for crimes involving cocaine base is particularly unfounded. The guidelines embody a 100:1 disparity in the way cocaine base offenses are treated compared to similar offense involving cocaine powder. The Sentencing Commission has issued multiple reports since 1993 declaring this disparity to be unjustified. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 10 (2002).

The Eighth Circuit's automatic endorsement of the guidelines calculation of the offense level further denied the substantial deference due the district court's assessment of the "seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). The district court dutifully assessed the seriousness of the offense in compliance with her statutory obligation. Appendix, p. 6. The court admonished petitioner Claiborne that his crimes were serious, yet the judge continued,"when I compare

your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – much [larger] amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that." *Id.* In fact, a first time offender convicted of distribution crimes involving a total of 5.23 grams of cocaine *powder* would have an offense level of 12 and an advisory guidelines range of 10 to 16 months. *See* U.S.S.G. §2D1.1(c)(14).

In the wake of *Booker*, neither the guidelines for crack nor powder cocaine bind the district court. The district court's choice of a 15-month sentence–near the high end of the range authorized for cocaine powder offenses involving up to 50 grams–is consistent with treating offenses involving cocaine base more seriously than similar offenses involving powder cocaine, while it simultaneously fulfills the judge's statutory duty to impose a sentence sufficient, but not greater than necessary to achieve both punishment and correctional treatment. *See* 18 U.S.C. § 3553(a)(2)(A), (D).

The *Booker* remedy did not stop the information-gathering process of the United States Sentencing Commission or the evolving nature of the Sentencing Guidelines calculations. The Court exhorted the Sentencing Commission to "collect and study appellate court decisionmaking" and to "modify its Guidelines

in light of what it learns, thereby encouraging what it finds to be better sentencing practices," and "thereby promot[ing] uniformity in the sentencing process." 543 U.S. at 263. The sentencing judge's independent evaluation of the seriousness of the offense in this case, as well as her judgment of the most effective correctional treatment for the defendant, embodies the very type of information *Booker* envisioned to flow under an advisory guidelines system. No such evolution can occur by enforcing the guidelines as a static set of sentence calculations.

The Eighth Circuit substitutes presumptive reasonableness in the Guidelines range for the substantial deference granted a sentencing judge's discretion, and effectively applies the *de novo* style of review struck down in *Booker*

As previously noted, the *Booker* remedy required the excision of the 2004 version of § 3742(e), particularly its requirement of *de novo* review of Guidelines departures "to make the Guidelines even more mandatory than they had been" *Booker*, 543 U.S. at 261. In its place the Court prescribed a standard of appellate review like the one used to review sentences imposed outside the applicable guidelines for "unreasonableness" prior to 2003. *Booker*, 543 U.S. at 261, *citing* §3742(e)(3) (1994 ed.). Under such review, the district court's decision to depart from the guidelines was entitled in most cases to "substantial deference, for it embodie[d] the traditional exercise of discretion by a sentencing court." *Koon v.*

United States, 518 U.S. at 98.

The district court judge based her assessment of Claiborne's rehabilitative capacities and the excessiveness of the advisory guidelines range – and, thus, her discretionary sentencing judgment – on her experiences sentencing countless other defendants. Appendix, p. 6-7. This type of determination falls within a class of decisions historically granted substantial deference in light of the district court's "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon v. United States*, 518 U.S. at 98. The development of the binding guideline sentencing regime did not alter the traditional judicial view that "'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams v. United States*, 503 U.S. 193, 205 (1992), *quoting Solem v. Helm*, 463 U.S. 277, 290, n. 16 (1983). "District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Koon v. United States*, 518 U.S. at 98.

The considerations favoring a deferential "abuse of discretion" standard have even greater force now, given the expanded discretion and considerations sentencing judges must consider under the advisory system *Booker* created.

Unshackled from the Guidelines prior exclusion of judicial consideration for a defendant's personal background and rehabilitative needs, judges now face a far broader range of sentencing considerations. *Booker*, 543 U.S. at 245-46.

The Eighth Circuit, however, awards deference to the guidelines range, not the reasons for the sentence, "as stated by the district court." *Booker*, 543 U.S. at 261. In Claiborne's case, the court of appeals did not even mention the sentencing judge's most salient consideration that imposing a guidelines sentence would be "tantamount to throwing [Claiborne] away." The Eighth Circuit instead presumed that the guidelines range was reasonable, and labeled the 22 month difference between the lowest guidelines term and the district court's sentence an "extraordinary variance" based on a mathematical calculation that fifteen months is sixty percent less than the minimum 37 months the guidelines required. *Id. United States v. Claiborne*, 439 F.3d at 481. The Eighth Circuit then declared that "comparably extraordinary circumstances" (sixty percent's worth) did not exist in the case to justify the percentage variance. The Eighth Circuit rejected the district court's reference to Claiborne's lack of a criminal record and the small amount of drugs involved, because the Eighth Circuit viewed those factors as sufficiently accounted for by the guidelines formula. *United States v. Claiborne*, 439 F.2d at 481. Appendix, p.3-4. The appellate court further declared that the sentencing

judge unreasonably failed to infer that Claiborne had distributed additional quantities of drugs in light of the fact he was charged with two drug crimes six months apart. *United States v. Claiborne*, 439 F.3d at 481.

The Eighth Circuit's approach cannot be squared with the deferential abuse of discretion standard used to assess the "reasonableness" of non-guidelines sentences prior to 2003. *Koon v. United States*, 518 U.S. at 98. The Eighth Circuit made no reference to the sentencing factors most salient to the district court – the judge's assessment of Claiborne's characteristics and the negative impact of the guidelines range on his rehabilitation. The Court of Appeals instead enforced its *sua sponte* inference on appeal that Claiborne engaged in other uncharged and unproved drug crimes. *United States v. Claiborne*, 439 F.3d at 481.

The Eighth Circuit describes its standard of "reasonableness" review as "a standard akin to our traditional review for abuse of discretion." *Id.* An abuse of discretion may occur under this standard when (1) a court fails to consider a relevant factor "that should have received significant weight," (2)"a court gives significant weight to an improper or irrelevant factor," or (3) considers "only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside of *the limited range of choice dictated by the facts of*

the case." *United States v. Haack*, 403 F.3d at 1004 (emphasis added). The Eighth Circuit borrowed this phraseology from civil cases relating to rulings on motions to dismiss without prejudice, among other things. *Id.*, *quoting Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). The Eighth Circuit notably failed to import from those same civil cases the principle that "in every case, we as an appellate court must be mindful that the district courts are closer to the facts and the parties, and that not everything that's important about a lawsuit comes through on the printed page." *Kern v. TXO Production Corp.*, 738 F.2d at 970.

The Eighth Circuit's resort to a "presumption of reasonableness" in the guidelines range, in lieu of the substantial deference historically due the sentencing judge's discretionary sentencing determination, results in a *de novo*-style of review, as Claiborne's case demonstrates. The appellate court, which had no opportunity to observe – much less question – Claiborne, presumes the proper range of sentence falls within the guidelines range. The appellate court made no mention of the sentencing judge's personal assessment of the defendant and the impact harsher sentences would have on his correction and rehabilitation. In withholding the substantial deference historically granted a district court judge's greater personal experience in sentencing, the Eighth Circuit uses a mathematical

exercise to declare the proportional force or "strength" of the justification the district court must muster to overcome the guidelines calculation.

The Eighth Circuit thus awards a sure advantage to the guidelines range – just as the *de novo* standard of guidelines departures did under the 2003 amendments to Section 3742(e). *Booker*, 543 U.S. at 261. So unwilling has the Eighth Circuit been to apply the deferential "reasonableness" review ordered in *Booker* that it recently reversed a sentencing "variance" from the guidelines that a sentencing judge based on the defendant's age and drug problems because the Guidelines advised that those considerations do not generally justify departures from the guidelines. *United States v. Lee*, 2006 U.S. APP. LEXIS 18173, *6 - *7 (8th Cir., July 20, 2006). The court of appeals's substituted its own *de novo* judgment that the cold record regarding Lee's circumstances did not warrant a downward variance because it did not warrant a downward departure. *Id.* The Court enforced the Guidelines range the same way it would have under the appellate review that applied prior to *Booker*.

The Circuit Conflict Regarding the "presumption of reasonableness" in guidelines review promotes disparity in sentencing

The split among the circuits over the use or rejection of a "presumption of reasonableness" in the guidelines when reviewing post-*Booker* sentences promotes

disparate sentencing results. The Eighth Circuit overturned Claiborne's sentence, making no mention of the district court's dominant sentencing concern for his chances for rehabilitation and dismissing the court's reference to his age, his otherwise clean record, and the small amount of drugs involved. In the Eleventh Circuit, which has not employed a presumption of guidelines reasonableness, the appellate court affirmed a similarly large guidelines variance from the guidelines for selling crack cocaine based on a defendant's age, minimal criminal record, and his health. *United States v. Williams*, 435 F.3d 1350, 1354-55 (11th Cir. 2006). The Eleventh Circuit measured the reasonableness of the sentence by focusing on the propriety of the sentencing considerations stated by the judge, which paralleled those cited by the judge that sentenced Claiborne. *Id.* The district court in the Eleventh Circuit did not have to justify its 'failure' to apply a guidelines sentence – much less provide justification proportional to the extent of the percentage variation from the guidelines range. The Eleventh Circuit would clearly have upheld Claiborne's sentence.

This Court's remedial majority in *Booker* opinion affirmatively admonished that the reasonableness review it prescribed would not provide the type of sentencing "uniformity" Congress originally sought to secure in sentencing. *Booker*, 543 U.S. at 263. However, the Court did not condone disparate sentences generated

by the use of conflicting standards of reasonableness review amongst the circuits.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitions this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Appendix to Petition for Writ of Certiorari

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America,	*	
	*	
Plaintiff - Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Missouri.
Mario Claiborne,	*	
	*	
Defendant - Appellee.	*	

Submitted: December 13, 2005
Filed: February 27, 2006

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.

LOKEN, Chief Judge.

Mario Claiborne pleaded guilty to two counts of possessing and distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). The district court determined that Claiborne's advisory guidelines sentencing range is 37 to 46 months in prison and imposed a 15-month sentence. The government appeals the sentence as unreasonable under 18 U.S.C. § 3553(a). We agree and remand for resentencing.

In May 2003, Claiborne was arrested for attempting to sell 0.23 grams of cocaine base to an undercover police officer. Six months later, police approached Claiborne engaged in what appeared to be a drug deal. He fled through the house next

door, throwing down a plastic baggie containing 5.03 grams of cocaine base. Claiborne was charged with and pleaded guilty to distributing cocaine base during the first incident and possessing cocaine base during the second.

At sentencing, the district court granted Claiborne "safety valve" relief from the five year mandatory minimum sentence under 18 U.S.C. § 844(a). See 18 U.S.C. § 3553(f); U.S.S.G. §§ 2D1.1(b)(7), 5C1.2. The court also rejected the government's position that he should receive a two-level increase for reckless endangerment because he fled through a nearby residence. See U.S.S.G. § 3C1.2. These rulings resulted in a guidelines sentencing range of 37 to 46 months in prison, which is not at issue on appeal. Recognizing that the guidelines are advisory under United States v. Booker, 543 U.S. 220 (2005), the district court sentenced Claiborne to 15 months in prison, concluding that "the 37 month low end of the range is, in my view, excessive" because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future. The government appeals, arguing that 15 months is an unreasonable downward variance from the guidelines range.

Under Booker, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir.), cert. denied 126 S.Ct. 276 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of the other statutory concerns" in § 3553(a). Booker, 543 U.S. at 245-46. When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion.

The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. See United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005). When the district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005); see Haack, 403 F.3d at 1004. "Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005) (citation omitted). A "range of reasonableness" is within the court's discretion. United States v. Saenz, 428 F.3d 1159, 1165 (8th Cir. 2005).

Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent downward variance. "An extraordinary reduction must be supported by extraordinary circumstances." United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the

fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

For the foregoing reasons, we conclude that the sentence is unreasonable and remand to the district court for resentencing.

2038244

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

FILED

APR 27 2006

MICHAEL GANS
CLERK OF COURT

No. 05-2198

United States of America,

Appellant,

vs.

Mario Claiborne,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

Judge Gruender did not participate in the consideration or decision of this matter.

(5128-010199)

April 27, 2006

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

from him, aside from inheriting his docket when his took senior status, I've gotten used to lecturing people. He was really good at that. I can't come close. But it really does disturb me when I see someone of your age in a federal courtroom about to go to prison. Most 21-year-olds are not out there selling drugs, Mr. Claiborne.

What you are doing is not normal behavior, and it doesn't have to be the only thing that you do in life. I know there are a lot of things you want for yourself and for your family. But you are going to have to learn how to get those things through legitimate means, just like the majority of people do. And you may have to do without some things.

You don't have to have the latest music or the latest fashions, even though you want them, because your freedom has got to be more important to you than some fad. Okay? When you get to the point where you value your freedom more, I think that you will change your whole attitude about what you do in life.

Now I want to talk to you about Mrs. Clemons. This lady had every right to have her door open on a nice day while she was outside with her children. You had absolutely no right to run through her house. Going into someone's house in that way is a personal violation. I understand you didn't threaten anyone. And your only thought probably was, "How do I get away from the police?" But you had no business

involving Mrs. Clemons and her family in your crime. That is unforgivable.

I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.

However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.

I don't think that that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger -- a much amount of drugs -- and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

As I said before, I do believe some term of imprisonment is appropriate in your case. And I hope that you don't view this as just the cost of doing business, and I

ORIGINAL

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
SEP 29 2006
OFFICE OF THE CLERK

No. 06-5618 (17)

IN THE SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 06-5618

MARIO CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 439 F.3d 479.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2006. A petition for rehearing was denied on April 27, 2006 (Pet. App. 5). The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1), and possession of more than five grams of cocaine base, in violation of 21 U.S.C. 844(a). He was sentenced to 15 months of imprisonment. The court of appeals vacated the sentence and remanded for resentencing.

1. On May 14, 2003, police detectives patrolling an area in St. Louis, Missouri, observed drug trafficking and decided to make a controlled purchase. An undercover detective drove past petitioner, who was standing on the sidewalk, and petitioner flagged him down. The detective stopped the car and told petitioner that he wanted $20 worth of crack cocaine. Petitioner got in the car and handed the detective a plastic bag containing what appeared to be crack. In return, the detective gave petitioner a marked $20 bill. When petitioner left the car, the police arrested him and seized the marked bill from his pocket. A laboratory analysis revealed that the substance in the plastic bag was .23 grams of cocaine base. Gov't C.A. Br. 3-4; Pet. App. 1.

On November 2, 2003, police officers responded to complaints of drug sales at a house at 3455 Oregon. When they arrived, they saw petitioner and another person engaged in what appeared to be a drug transaction on the front porch of the house. When petitioner

and the other man saw the officers, petitioner threw down a plastic bag containing what appeared to be crack cocaine, entered the house with the other man, and locked the door. The two men then left the house through the rear, ran back toward the front, and entered a nearby house, at 3429 Oregon, without the permission of the occupants, a woman and her grandchildren. Petitioner then ran out the back of that house and escaped. A short time later, the officers arrested petitioner at his own house, a few blocks away. A laboratory analysis of the substance petitioner had discarded revealed that it was 5.03 grams of cocaine base. Gov't C.A. Br. 4-6; Pet. App. 1-2.

2. Petitioner was charged in a superseding indictment with distributing cocaine base in May 2003 and possessing more than five grams of cocaine base in November 2003, in violation of 21 U.S.C. 841(a)(1) and 844(a). He pleaded guilty to both charges. Gov't C.A. Br. 1, 7. Pet. App. 2.

In calculating petitioner's offense level, the Probation Office began with a base offense level of 26 because the amount of crack exceeded five grams; added two levels because petitioner recklessly created a substantial risk of death or serious bodily injury when he fled into the house at 3429 Oregon; and subtracted three levels for acceptance of responsibility. That calculation resulted in a total offense level of 25, which, when combined with a criminal history category of I, yielded a Sentencing Guidelines

range of 57 to 71 months of imprisonment. Because the offense involved more than five grams of cocaine base, however, petitioner was subject to a statutory minimum prison term of five years. The effective Guidelines range was therefore 60 to 71 months. PSR ¶¶ 19-28, 33, 48; Gov't C.A. Br. 8; see 21 U.S.C. 844(a); Sentencing Guidelines §§ 2D1.1(a)(3) and (c)(7), 3C1.2, 3E1.1, 5G1.1 (c)(2) (2004).

3. Before the district court sentenced petitioner, this Court decided United States v. Booker, 543 U.S. 220 (2005). Booker held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act (SRA). 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245 (citations omitted). The Court also severed the appellate-review standards in 18 U.S.C. 3742(e), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," under which courts of appeals determine

"whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.'

Section 3553(a) provides as follows:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed --
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for --
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code * * * [;]
>
> * * * *
>
> * * * *

4. At sentencing, the district court declined to apply an enhancement for reckless endangerment and found that petitioner satisfied the "safety valve" criteria of 18 U.S.C. 3553(f) and Sentencing Guidelines § 5C1.2. As a consequence, petitioner's offense level was 21, his Guidelines range was 37 to 46 months, and he was not subject to a statutory minimum sentence. The district court imposed a sentence of 15 months of imprisonment. The court explained that a sentence at the low end of the Guidelines range -- 37 months -- would be "excessive," because of petitioner's lack of criminal history, his youth, the small quantity of drugs involved in the crimes of conviction, and the court's belief that petitioner was not likely to commit similar crimes in the future. Gov't C.A. Br. 8-9; Pet. App. 2.

5. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1-4.

---

(5) any pertinent policy statement --

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code * * * [;]

* * * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

The court of appeals noted that, although the Sentencing Guidelines are no longer mandatory, district courts are still required to take them into account, together with the other sentencing factors in 18 U.S.C. 3553(a). Pet. App. 2. The court then explained that, when, as in this case, the district court has correctly calculated the advisory Guidelines range, the court of appeals will "review the resulting sentence for reasonableness, a standard akin to * * * traditional review for abuse of discretion." Ibid. The court observed that a sentence within the advisory Guidelines range "is presumed reasonable," because the "Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study." Id. at 3. The court added, however, that a sentence outside the advisory Guidelines range will be found reasonable "so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a)," with a proportionately more compelling justification required as the extent of the variance from the Guidelines range increases. Ibid. (quoting United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005)). In particular, the court said, "[a]n extraordinary reduction must be supported by extraordinary circumstances." Ibid. (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)).

Applying those principles, the court of appeals held that the sentence imposed in this case was unreasonable. Pet. App. 3-4. The court reasoned that the 15-month sentence reflected a "sixty percent downward variance" from the bottom of the 37-to-46-month advisory Guidelines range, that 60 percent was "an extraordinary variance," and that it was "not supported by comparably extraordinary circumstances." Id. at 3. In finding a lack of extraordinary circumstances, the court explained that petitioner's lack of criminal history "was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence"; that the small quantity of drugs "was taken into account in determining his guidelines range"; that petitioner "committed a second serious drug offense six months after his first arrest"; and that it was a "fair inference" that he "distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police." Id. at 3-4.

ARGUMENT

Petitioner contends (Pet. 6-24) that the standards applied by the court of appeals in reviewing his sentence for unreasonableness are inconsistent with United States v. Booker, 543 U.S. 220 (2005). Petitioner is mistaken, and further review is unwarranted.

1. The court of appeals vacated petitioner's sentence and remanded the case to the district court for resentencing. The decision is therefore interlocutory, a posture that "of itself

alone furnishe[s] sufficient ground" for the denial of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); accord Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967); American Constr. Co. v. Jacksonville Ry., 148 U.S. 372, 384 (1893); Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring). This Court ordinarily denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., Supreme Court Practice § 4.18, at 258 n.59 (8th ed. 2002). The practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court. See ibid. While not an invariable rule, the practice makes particular sense in this case, where petitioner challenges the sentencing procedures employed by the court of appeals and his sentence is not yet final.

2. Petitioner's challenge to the court of appeals' standards for reviewing sentences would not warrant review by this Court even if the decision below were not interlocutory.

a. The principle on which the court of appeals relied in holding that petitioner's sentence was unreasonable is that "[a]n extraordinary reduction must be supported by extraordinary circumstances." Pet. App. 3 (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)). That principle is fully

consistent with Booker. The Court in Booker observed that, after its decision, the Sentencing Commission will "remain[] in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." 543 U.S. at 264. The Court also pointed out that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," and that "[t]he courts of appeals [will] review [those] sentencing decisions for reasonableness." Ibid. Accordingly, the Court explained, the Guidelines will "promote uniformity in the sentencing process" and "help[] to avoid excessive sentencing disparities." Id. at 263-264. Given Booker's recognition of the important role of the Guidelines in fostering uniformity and the function of appellate review in "tend[ing] to iron out sentencing differences," id. at 263, it is entirely in keeping with Booker for appellate courts, in conducting review for unreasonableness, to require a compelling justification for a sentence that is far outside the advisory Guidelines range.

That principle has been uniformly applied by the courts of appeals since Booker. As Judge Sutton recently explained, "every court of appeals to consider the question * * * take[s] the view that when the district court independently chooses to deviate from the advisory guidelines range (whether above or below it), [the court of appeals] appl[ies] a form of proportionality review: 'the

farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a)' must be." United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006) (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.), and citing cases from First, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits). Petitioner contends (Pet. 7-8, 23) that the decision below conflicts with United States v. Williams, 435 F.3d 1350 (2006), in which the Eleventh Circuit affirmed a sentence for a crack offense that was more than 50 percent below the bottom of the advisory Guidelines range. But since the Eleventh Circuit has endorsed the principle that "[a]n extraordinary reduction must be supported by extraordinary circumstances," United States v. Crisp, 454 F.3d 1285, 1291 (11th Cir. 2006) (quoting Dalton, 404 F.3d at 1033); accord, e.g., United States v. Martin, 455 F.3d 1227, 1236-1237 (11th Cir. 2006); United States v. McVay, 447 F.3d 1348, 1357 (11th Cir. 2006), there is no disagreement between the Eleventh Circuit and the court below with respect to the rule applied in this case.

b. Petitioner also contends (Pet. 11-14, 22-24) that according a presumption of reasonableness to a sentence within the Guidelines range makes the Guidelines effectively mandatory, in violation of Booker, and that there is a circuit conflict on whether a sentence within the advisory Guidelines range is entitled to a presumption of reasonableness on appellate review. That

question is not presented in this case. Although the court of appeals mentioned the presumption of reasonableness (Pet. App. 3), petitioner's sentence was not within the Guidelines range and thus the court of appeals did not apply that presumption. In any event, as the government has explained in briefs in opposition to other petitions that raise the claim, according a Guidelines sentence a presumption of reasonableness is consistent with Booker and does not make the Guidelines effectively mandatory, and it is not clear that reasonableness review is materially different in circuits that have adopted the presumption than in those that have not. See, e.g., Gov't Br. in Opp. at 7-14, Guzman-Balbuena v. United States, No. 05-10634, 2006 WL 2089475 (filed June 29, 2006); Gov't Br. in Opp. at 13-19, Artis v. United States, No. 05-10431, 2006 WL 1733084 (filed June 19, 2006).

c. Petitioner also contends (Pet. 15-17) that the 15-month sentence imposed on him was not unreasonable because Congress has prescribed harsher punishment for offenses involving crack cocaine than for offenses involving powder cocaine and the Sentencing Commission has expressed disagreement with that policy. That question is also not presented in this case, because the district court did not rely on that consideration in imposing sentence, see Sent. Tr. 21-25, and the court of appeals therefore had no occasion to address the permissibility of doing so. In any event, the courts of appeals that have addressed that question have uniformly

concluded that categorical disagreement with the congressionally prescribed crack-powder ratio is not a permissible basis for a reduced sentence. See United States v. Castillo, 460 F.3d 337, 353 (2d Cir. 2006) (agreeing with First, Fourth, and Eleventh Circuits).

d. Petitioner also contends (Pet. 17-24) that the court of appeals violated Booker by applying a standard of review that was effectively de novo. That is not correct. In reviewing petitioner's sentence for unreasonableness, the court of appeals explicitly stated that it was applying "a standard akin to * * * traditional review for abuse of discretion." Pet. App. 2. Contrary to petitioner's claim, moreover, that standard is entirely consistent with "the deferential abuse of discretion standard used to assess the 'reasonableness' of non-guidelines sentences prior to 2003," when Congress amended the SRA to require de novo review of departures. Pet. 20 (citing Koon v. United States, 518 U.S. 81, 98 (1996)). Under the pre-2003 standard, a sentence was "reasonable" if "the reasons given by the district court" were "sufficient to justify the magnitude of the departure," Williams v. United States, 503 U.S. 193, 204 (1992), and it logically follows from that general principle that a reduction (or increase) of "extraordinary" magnitude requires "extraordinary" reasons, Pet. App. 3. Petitioner is equally mistaken in his suggestion (Pet. 7, 20-21) that it is inconsistent with an abuse-of-discretion standard to

say, as the Eighth Circuit has, that there is a "limited range of choice dictated by the facts of [a particular] case." United States v. Haack, 403 F.3d 997, 1004, cert. denied, 126 S. Ct. 276 (2005). If there were an unlimited range of choice in each case, the district court's discretion in imposing sentence would be unreviewable, not reviewable for an abuse. Cf. Booker, 543 U.S. at 263 (noting that "appellate review[] would tend to iron out sentencing differences"). Finally, to the extent that petitioner is arguing that the court of appeals misapplied the abuse-of-discretion standard in holding that the sentence in this case was unreasonable, see Pet. 20, that contention also does not warrant review, because "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law," Sup. Ct. R. 10.

3. This Court has granted certiorari in Cunningham v. California, No. 05-6551 (cert. granted Feb. 21, 2006), to decide whether California's Determinate Sentencing Law violates the Sixth and Fourteenth Amendments by permitting sentencing judges to impose enhanced sentences based on facts not found by the jury or admitted by the defendant. The petition in this case need not be held pending the disposition of Cunningham, however, because the federal Guidelines system is unlike the California sentencing scheme.

Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower

term, a middle term, and an upper term. See People v. Black, 113 P.3d 534, 538 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2005). California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime," Cal. Penal Code § 1170(b), and a rule issued under the law provides that a court may impose the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b). Aggravating and mitigating circumstances may be established by a preponderance of the evidence, ibid., and, in determining the "relevant facts," the court may consider "the record in the case, the probation officer's report, other reports * * * and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, * * * and any further evidence introduced at the sentencing hearing," Cal. Penal Code § 1170(b).

Unlike the California law, which is "worded in mandatory language," Black, 113 P.3d at 544, the SRA, as modified by Booker, is not a determinate sentencing law. The federal Guidelines are "effectively advisory," Booker, 543 U.S. at 245, and federal sentences are ultimately based on the factors in 18 U.S.C. 3553(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2006

ORIGINAL

Supreme Court, U.S.
FILED
OCT 24 2006
OFFICE OF THE CLERK

(13)

CASE NO. 06-5618

SUPREME COURT OF THE UNITED STATES
October 2005 Term

MARIO CLAIBORNE,)
)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

REPLY BRIEF FOR PETITIONER

Submitted By:

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court ruled that the mandatory use of the United States Sentencing Guidelines violated the Sixth Amendment right to a jury trial on any fact required to enhance a criminal sentence. The Court remedied the error by making the Guidelines "effectively advisory" and, therefore, just one of many factors a court considers in choosing a sentence under 18 U.S.C. § 3553(a). The Court also prescribed appellate review of sentences for "reasonableness" in light of all the section 3553(a) factors and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based this "reasonableness" standard paid "substantial deference" to a sentencing judge's discretionary choices in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81 (1996).

In light of the foregoing, these issues are presented:

1. Does an appellate court make the Sentencing Guidelines effectively mandatory by granting a presumption of reasonableness to the Guidelines range in reviewing a sentence outside that range, rather than granting deference to the sentencing judge's decision in light of all the 3553(a) factors?

2. Does granting a presumption of reasonableness to the guidelines range deny the substantial deference granted a district court's discretionary sentencing decision under the "reasonableness" standard chosen in *Booker*?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 439 F.2d 479 (8th Cir. 2006).

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on February 27, 2005. The petition for rehearing was denied on April 27, 2006. Petition for Certiorari, Appendix 5. The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REPLY BRIEF FOR THE PETITIONER

The government erroneously claims the Eighth Circuit did not apply a presumption of reasonableness to the Federal Sentencing Guidelines. Brief in Opposition 11-12. The government's reluctance to engage petitioner's argument is understandable, yet its claim that the Eighth Circuit did not employ a presumption of reasonableness in the guidelines to review a non-guidelines sentence embodies a tacit admission that to do so would violate *United States v. Booker*, 543 U.S. 200 (2005). Respondent's brief thus confirms the urgency of granting certiorari here to address the unconstitutional abuse of the presumption of guidelines reasonableness to reject non-guidelines sentences.

The Eighth Circuit based its rejection of petitioner's non-Guidelines sentence on a presumption that the Guidelines range was reasonable instead

The Solicitor General's claim that the Eighth Circuit did not apply a presumption of reasonableness to the guidelines to declare petitioner's non-guidelines sentence unreasonable flies in the face of the plain terms of the opinion:

> a. The Eighth Circuit cited the presumption of reasonableness in the guidelines, Appendix 3.
>
> b. The Eighth Circuit labeled the district court's sentence an "extraordinary variance from the guidelines range," using a purely mathematical measure of the percentage by which it fell short of the guidelines. Appendix 3.

c. The Eighth Circuit dismissed the district court's concern about the small amount of drugs involved by reasoning that the guidelines already accommodated that circumstance. Appendix 3.

d. The Eighth Circuit rejected the district court's assessment of the likelihood petitioner would re-offend by interposing its own judgment on appeal that a defendant who committed two drug offenses in six months "has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency." Appendix. 3-4.

e. The Eighth Circuit made no mention of the judge's predominant concern that imposing a guidelines range would be "tantamount to throwing [petitioner] away", or, to paraphrase 18 U.S.C. §3553(a), greater than necessary to achieve rehabilitation as well as punishment in view of petitioner's age.

In short, the analysis by which the Eighth Circuit rejected the district court's non-guidelines sentence as unreasonable rested entirely on the presumption that the contrary guidelines range ***was*** reasonable.

The Solicitor General purports to justify the Eighth Circuit's use of the guidelines in rejecting sub-guidelines sentences on the basis that *Booker* declared the advisory guidelines a still important consideration in sentencing defendants thereafter. Petitioner's sentencing judge, however, *did* seriously consider the guidelines advisory range and then imposed a lesser sentence based on additional considerations, specifically the rehabilitative consideration that a guidelines sentence would extinguish petitioner's chances for successful reintegration into

society. Petition for Certiorari, Appendix 6-7. The Eighth Circuit avoided any mention of these statements by the district court, although they comprised the dominant basis for the judge's rejection of a guidelines sentence.

Different appellate results occur depending on whether a circuit employs a presumption of reasonableness in the advisory guidelines range

The Second Circuit's opinion in *United States v. Jones*, 460 F.3d 190 (2nd Cir. 2006), refutes the government's claim that no material difference arises in the analysis or results reached by jurisdictions that do not grant a presumption of reasonableness in the guidelines (Brief in Opposition 12). This may, in turn, explain the government's failure to mention *Jones* despite the supplemental brief petitioner filed to cite that intervening case. The Second Circuit *affirmed* Jones's fifteen-month sentence for drug related charges notwithstanding the advisory guidelines range of 30-37 months. 460 F.3d at 195. The Second Circuit granted substantial deference to the district court's concerns about Jones's chances for rehabilitation and reintegration into society. Such concerns closely resembled those articulated by petitioner's sentencing judge, but neither the Eighth Circuit nor the Solicitor General make any mention of them.

The Solicitor General asserts that the Eighth Circuit did not engage in ***de novo*** review because the court of appeals said it applied a standard of review "akin

to * * * traditional review for abuse of discretion," and such review is consistent with the deferential standard of review referred to in *Koon v. United States*, 518 U.S. 81, 98 (1996). Brief in Opposition 13. The Solicitor General makes no effort to reconcile these assertions with the absence from the Eighth Circuit's opinion (and the government's own pleading) of any reference to the sentencing judge's explanation of her dominant concern that imposing a guidelines sentence would be "tantamount to throwing [petitioner] away." Nor does the Solicitor General explain how a "traditional review for abuse of discretion" authorizes an appellate court to reject a district court's sentence on the basis that the district judge failed to infer that the defendant engaged in other crimes of which no evidence or accusation appeared. Appendix 3.

Decision in *Cunningham* may well bear on appellate review of federal criminal sentencing

The Solicitor General volunteered that this Court need not hold this petition pending the Court's disposition of *Cunningham v. California*, No. 05-6551 (cert. granted Feb. 21, 2006), because that case involves a California sentencing scheme "unlike the federal sentencing scheme." Brief in Opposition 14. The transcript of oral argument in *Cuningham* refutes the government's quick dismissal of any

possible relevance *Cunningham* may have to the questions presented in this case. Several members of the Court observed that California's sentencing regime "looks a lot like the federal system after *Booker*," *Cunningham* Oral Argument Transcript 6 (Chief Justice Roberts speaking). *See also, e.g., Cunningham* Oral Argument Transcript at page 17, lines 1-3 (Justice Ginsberg: ". . . [I]sn't the middle sentence [in *Cunningham*] identical in function to the Federal sentencing guidelines advice?"); *id.* at page 20, lines 11-18 (Justice Breyer: "Now if [the California courts] are adopting what *Booker* says, that means, . . . that I guess a judge would have the power if it is reasonable to just say the guideline, thought it [is] thus and so, isn't right for my circumstance and therefore, I don't adopt it. . . ."). This Court's questions at the oral argument in *Cunningham* do not, of course, establish what the Court will ultimately rule in that case. The substantial attention paid to the post-*Booker* federal guidelines regime – particularly the role to be played by "reasonableness" review – during the *Cunningham* oral argument, however, counsels against denying certiorari before *Cunningham* is decided.

The Eighth Circuit's judgment is not an "interlocutory ruling"

The government erroneously labels the Eighth Circuit's decision an "interlocutory ruling." Brief in Opposition 8-9. The Eighth Circuit's ruling did not constitute an "interlocutory ruling." The government brought this appeal

from petitioner's final judgment of conviction and sentence. Appendix 1. The Eighth Circuit declared as a final matter that the district court's choice of a fifteen months sentence was unreasonable because it viewed a sixty percent reduction below the minimum guidelines term "is not supported by comparably extraordinary circumstances." Appendix 3. The examples the government cites of interlocutory rulings concerning injunctions entered to permit determination of damages and equitable remedies in civil cases do not support its designation of the Eighth Circuit's stark rejection of the district court's sentence as an "interlocutory ruling." Brief in Opposition 9. The bare fact the Eighth Circuit ordered a new sentence did not render interlocutory its ruling that fifteen months in this case is "unreasonable" *per se*, any more than the Seventh Circuit's order of a new sentencing of Freddie J. Booker constituted an "interlocutory ruling" in *Booker*. *See United States v. Booker*, 375 F.3d 508, 515 (7th Cir. 2004).

CONCLUSION

WHEREFORE, for the foregoing reasons, and those offered in petitioner's petition for a writ of certiorari and supplemental brief in support thereof, petitioner asks this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Appendix to Petitioner's Reply Brief in Support of Petition for Writ of Certiorari

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1. Appellate Opinion in *United States v. Claiborne* (Feb. 27, 2006) ..... 1 - 4

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America,	*	
	*	
Plaintiff - Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Missouri.
Mario Claiborne,	*	
	*	
Defendant - Appellee.	*	

Submitted: December 13, 2005
Filed: February 27, 2006

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.

LOKEN, Chief Judge.

Mario Claiborne pleaded guilty to two counts of possessing and distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). The district court determined that Claiborne's advisory guidelines sentencing range is 37 to 46 months in prison and imposed a 15-month sentence. The government appeals the sentence as unreasonable under 18 U.S.C. § 3553(a). We agree and remand for resentencing.

In May 2003, Claiborne was arrested for attempting to sell 0.23 grams of cocaine base to an undercover police officer. Six months later, police approached Claiborne engaged in what appeared to be a drug deal. He fled through the house next

door, throwing down a plastic baggie containing 5.03 grams of cocaine base. Claiborne was charged with and pleaded guilty to distributing cocaine base during the first incident and possessing cocaine base during the second.

At sentencing, the district court granted Claiborne "safety valve" relief from the five year mandatory minimum sentence under 18 U.S.C. § 844(a). See 18 U.S.C. § 3553(f); U.S.S.G. §§ 2D1.1(b)(7), 5C1.2. The court also rejected the government's position that he should receive a two-level increase for reckless endangerment because he fled through a nearby residence. See U.S.S.G. § 3C1.2. These rulings resulted in a guidelines sentencing range of 37 to 46 months in prison, which is not at issue on appeal. Recognizing that the guidelines are advisory under United States v. Booker, 543 U.S. 220 (2005), the district court sentenced Claiborne to 15 months in prison, concluding that "the 37 month low end of the range is, in my view, excessive" because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future. The government appeals, arguing that 15 months is an unreasonable downward variance from the guidelines range.

Under Booker, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir.), cert. denied 126 S.Ct. 276 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of the other statutory concerns" in § 3553(a). Booker, 543 U.S. at 245-46. When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion.

The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. See United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005). When the district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005); see Haack, 403 F.3d at 1004. "Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005) (citation omitted). A "range of reasonableness" is within the court's discretion. United States v. Saenz, 428 F.3d 1159, 1165 (8th Cir. 2005).

Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent downward variance. "An extraordinary reduction must be supported by extraordinary circumstances." United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the

fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

For the foregoing reasons, we conclude that the sentence is unreasonable and remand to the district court for resentencing.

Supreme Court, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

No. 06-5618

In The Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX VOLUME I

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Petition For Certiorari Filed July 26, 2006
Certiorari Granted November 3, 2006

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RELEVANT DOCKET ENTRIES*

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF MISSOURI

07/29/2004	1	Indictment referred to Magistrate Judge Buckles as to Mario Claiborne (1) count(s) 1. (Attachments: #1 Criminal Cover Sheet) (KLK,) (Entered: 07/30/2004)
09/08/2004	18	Order Setting Conditions of Release as to Mario Claiborne (1) $10,000 secured by 10% Signed by Judge Terry I. Adelman on 9/8/04. (KLH,) (Entered: 09/10/2004)
10/07/2004	31	Superseding Indictment as to Mario Claiborne Referred to Magistrate Judge Frederick R. Buckles as to Mario Claiborne (1) count(s) 1s, 2s. (Attachments: #1 Criminal Cover Sheet) (CDD,) (Entered: 10/08/2004)
12/03/2004	43	Minute Entry for Change of Plea Hearing proceedings held before Judge Donald J. Stohr as to Mario Claiborne; Plea of Guilty entered on Counts 1s, 2s. NO PLEA AGREEMENT FILED; Stipulation filed and was adopted and approved; Probation Officer in court: Linda Rogoz; Objections to Presentence Report due by 2/4/2005. Sentencing set for 2/25/2005 02:30 PM in Courtroom 16S before Honorable Donald J. Stohr. (Court Reporter or FTR Gold Operator initials: Patti Dunn Wecke.) (proceedings

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

started: 2:07.) (proceedings ended: 2:22.) (Defendant Location: Bond.) (KKS,) (Entered: 12/06/2004)

12/03/2004 44 Stipulation of Factual Basis for Guilty Plea by USA, Mario Claiborne as to Mario Claiborne (KKS,) (Entered: 12/06/2004)

03/11/2005 48 Objection to Presentence Investigation Report by Mario Claiborne (Dwyer, Michael) (Entered: 3/11/2005)

03/25/2005 50 Response to Objection to Presentence Investigation Report by USA as to Mario Claiborne (Stevens, Cristian) (Entered: 3/25/2005)

03/27/2005 51 Sentencing Memorandum – *Reply to Government's Sentencing Memorandum and Response to Defendant's Objections to the Presentence Report* by defendant Mario Claiborne (Dwyer, Michael) (Entered: 3/27/2005)

03/28/2005 53 Judgment as to Mario Claiborne (1), Count(s) 1s, Deft. pled guilty on 12/3/04. Imprisonment – 15 months to run concurrently to Count II. Recommendations – incarceration as close to the St. Louis, MO area as possible. Deft. remanded. Supervised release – 3 years. See judgment for additional terms of supervised release terms. Special assessment of $100 due immediately. Count(s) 2s, Pled guilty on 12/3/04. Imprisonment – 15 months to run concurrently with Count I. Recommendations – same as Count I. Supervised release and additional supervised release terms – same as Count I. Special assessment of $100 due immediately. Signed

by Judge Carol E. Jackson on 3/28/05. (LGK,) (Entered: 3/29/2005)

4/21/2005 56 Original Transcript (Pilot) as to Mario Claiborne proceedings of Sentencing Hearing held on 3/28/05 before Judge Carol E. Jackson. Court Reporter: G. Bond. The transcript filed with the court will not be remotely available until such time as the period for redaction has expired or a request for redaction has received and the redacted transcript filed. For additional information see the Notice/Instructions to the Bar regarding Electronic Availability of Criminal Transcripts on the Court's website at www.moed.uscourts.gov (KCM,) (Entered: 4/21/2005)

04/25/2005 57 Notice of Appeal by USA as to Mario Clairborne re 53 Judgment, Filing fee $ no fee required. (Stevens, Cristian) (Modified on 4/26/2005) (LJK,). (Entered: 04/25/2005)

06/20/2006 75 Order granting 72 Motion to Continue as to Mario Claiborne (1) pending dft's petition for writ of certiorari. Signed by Judge Carol E. Jackson on 6/20/06. (LLW,) (Entered: 06/20/2006)

UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

05/03/2005	Criminal Case Docketed Dist. Ct. Office: St. Louis, Missouri (dlb)
02/27/2006	THE COURT: James B. Loken, Roger L. Wollman, William J. Riley. OPINION FILED by James B. Loken, Authoring Judge Published. [05-2198] [2013890] (mer)
02/27/2006	JUDGMENT: James B. Loken, Roger L. Wollman, William J. Riley. :REMANDED to the district court for resentencing [05-2198] [2013892] (mer)
03/27/2006	PETITION FOR REHEARING with petition for rehearing en banc. Filed by Appellee Mario Claiborne, w/ service 3/27/06., TO COURT [05-2198] (srd)
04/27/2006	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [2026700-1] filed by Mario Claiborne. Petition for panel Rehearing is also denied. Judge Bye and Judge Smith would grant the petition for rehearing en banc. Judge Gruender did not participate in the consideration or decision of this matter. [05-2198] [2038249] (srd)
05/10/2006	MANDATE ISSUED [05-2198] (srd)
08/07/2006	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 07/26/06. Supreme Ct. Case No.: 06-5618 [05-2198] [2077167] (srd)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 4:04 CR 00423DJS
MARIO CLAIBORNE,	)	
Defendant.	)	

INDICTMENT

(Filed Jul. 29, 2004)

COUNT ONE

A. The Grand Jury charges that:

On or about November 2, 2003, in the City of St. Louis, within the Eastern District of Missouri,

MARIO CLAIBORNE,

the Defendant herein, did knowingly and intentionally possess with the intent to distribute in excess of five grams of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II narcotic controlled substance drug.

In violation of Title 21, United States Code, Section 841(a)(1), and punishable under Title 21, United States Code, Section 841(b)(1)(B)(iii).

B. Pursuant to Title 28, United States Code, Section 994, and the United States Sentencing Guidelines promulgated in accordance therewith, the Grand Jury further charges

the following offense conduct and factors relevant to the offense charged in paragraph A:

The quantity of cocaine base (crack) for which the Defendant is responsible is at lease five grams but less than twenty grams, thereby making the offense punishable under United States Sentencing Guidelines Section 2D1.1(c)(7).

The Defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, thereby making the offense punishable under United States Sentencing Guidelines Section 3C1.2.

A TRUE BILL.

/s/ William A. Miller
FOREPERSON

JAMES G. MARTIN
United States Attorney

/s/ Christian M. Stevens
CHRISTIAN M. STEVENS, #98871
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. S1-4:04 CR 423 DJS (FRB)
MARIO CLAIBORNE,	)	
Defendant.	)	

FIRST SUPERCEDING INDICTMENT

(Filed Oct. 7, 2004)

COUNT ONE

A. The Grand Jury charges that:

On or about May 14, 2003, in the City of St. Louis, within the Eastern District of Missouri,

MARIO CLAIBORNE,

the Defendant herein, did knowingly and intentionally distribute a quantity of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II controlled substance drug.

In violation of Title 21, United States Code, Section 841(a)(1), and punishable under Title 21, United States Code, Section 841(b)(1)(C).

B. Pursuant to Title 28, United States Code, Section 994, and the United States Sentencing Guidelines promulgated in accordance therewith, the Grand Jury further charges the following offense conduct and factors relevant to the offense charged in paragraph A:

The quantity of actual cocaine base (crack) for which the Defendant is responsible is less than 250 milligrams of cocaine base (crack), thereby making the offense punishable under United States Sentencing Guidelines Section 2D1.1(c)(14).

COUNT TWO

A. The Grand Jury further charges that:

On or about November 2, 2003, in the City of St. Louis, within the Eastern District of Missouri,

MARIO CLAIBORNE,

the Defendant herein, did knowingly and intentionally possess in excess of five grams of a mixture or substance containing a detectable amount of cocaine base (crack), a Schedule II controlled substance drug.

In violation of Title 21, United States Code, Section 844(a).

B. Pursuant to Title 28, United States Code, Section 994, and the United States Sentencing Guidelines promulgated in accordance therewith, the Grand Jury further charges the following offense conduct and factors relevant to the offense charged in paragraph A:

The quantity of actual cocaine base (crack) for which the Defendant is responsible more than five grams but less than 20 grams of cocaine base (crack), thereby making the offense punishable under United States Sentencing Guidelines Sections 2D2.1(b)(1) and 2D1.1(c)(7).

The Defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, thereby making the offense punishable under United States Sentencing Guidelines Section 3C1.2.

A TRUE BILL.

/s/ Jen Jensen
FOREPERSON

JAMES G. MARTIN
United States Attorney

/s/ Christian M. Stevens
CHRISTIAN M. STEVENS, #98871
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 4:04 CR 423 DJS
MARIO CLAIBORNE,	)	
Defendant.	)	

STIPULATION OF FACTUAL BASIS FOR GUILTY PLEA

(Filed 12/03/2004)

Defendant Mario Claiborne, through his attorney, Assistant Federal Public Defender Michael Dwyer, and the United States of America, through Assistant United States Attorney Cristian M. Stevens, stipulate as follows:

1. There is no plea agreement in this case. Defendant will plead guilty to both counts in the superseding indictment, admitting the statutory elements constituting the violations charged in the superseding indictment: (1) distribution of 0.23 grams of crack cocaine on May 14, 2003, a violation of 21 U.S.C. §841(a)(1), charged in Count One of the superseding indictment and (2) possession of 5.03 grams of crack cocaine on November 2, 2003, a violation of 21 U.S.C. § 844(a), charged in Count Two of the superseding indictment.

2. **ELEMENTS OF THE OFFENSES**

A. As to Count One, Defendant admits to violating 21 U.S.C. § 841(a)(1), the elements of which are:

1. Defendant intentionally transferred a quantity of cocaine base (crack) to another person; and

2. At the time of the transfer, Defendant knew he was transferring cocaine base (crack).

B. As to Count Two, Defendant admits to violating 21 U.S.C. § 844(a), the elements of which are:

1. Defendant possessed cocaine base (crack);

2. Defendant knew that he possessed cocaine base (crack); and

3. He possessed more than 5 grams of cocaine base (crack).

3. STATUTORY PENALTIES

The maximum possible penalty for Count One is imprisonment of not more than 20 years, a fine of not more than $1,000,000, or both. The Court shall also impose a period of supervised release of not less than three years and impose a special assessment of $100.

The maximum possible penalty for Count Two is imprisonment of not less than five years or more than 20 years, a fine of at least $1,000, or both. The Court may also impose a period of supervised release of not more than three years and a special assessment of $100.

4. SUPERVISED RELEASE

Defendant understands that the Court, pursuant to 18 U.S.C. § 3583 and Sentencing Guidelines §5D1.1-§5D1.2, may impose a term of supervise release to follow any term

of imprisonment. The Court will impose standard conditions upon Defendant and may impose special conditions concerning Defendant if the Court deems them necessary. Defendant will be required to adhere to these conditions. He understands that violation of any condition of supervised release may cause the Court to revoke his supervised release. Revocation of supervised release may result in his being required to serve a term of imprisonment equal to, but not greater than, the term of supervised release. If his supervised release is revoked, Defendant will not receive credit for time already served on supervised release.

Defendant understands that parole has been abolished. If the Court imposes a term of imprisonment, he will serve the entire term less any "good time" he earns pursuant to 18 U.S.C. § 3624.

5. MANDATORY SPECIAL ASSESSMENT

The Court is required, under 18 U.S.C. § 3013, to impose a mandatory special assessment of $100 per count for a total of $200. Defendant agrees to pay the special assessment at the time of sentencing. If, however, he is unable to pay this special assessment at sentencing, he agrees that any money paid toward restitution or other fine will first be used to pay the mandatory special assessment.

6. FINES, RESTITUTION, AND COSTS

The Court may impose a fine, restitution, costs of incarceration, and costs of supervision. Defendant understands that any fine or restitution that the Court imposes is due immediately. He also understands that any fine,

restitution, or special assessment that the Court imposes can not be discharged in bankruptcy under any circumstances.

7. POSSIBILITY OF DETENTION

Defendant acknowledges that upon entering his plea of guilty to the two counts of the superseding indictment, he may be subject to immediate detention pursuant to 18 U.S.C. § 3143.

8. ACKNOWLEDGMENT AND WAIVER OF DEFENDANT'S RIGHTS

Defendant acknowledges and understands the following rights: the right to plead not guilty; the right to be tried by a jury in a public and speedy trial; the right to file pre-trial motions, including motions to suppress evidence; the right to the presumption of innocence at trial; the right to require the government to prove the case against Defendant beyond a reasonable doubt; the right not to testify; the right not to present any evidence; the right to be protected from compelled self-incrimination; the right to confront and cross-examine witnesses at trial; the right to testify and present evidence; and the right to compel the attendance of witnesses. He understands that by his guilty plea, he waives all of these rights.

Defendant further understands that he has the right to be represented by counsel. If necessary the Court will appoint counsel at trial and every other stage of the proceedings.

Defendant's attorney has explained all of these rights and the consequences of waiving or giving up these rights.

Defendant understands that by pleading guilty, no trial will occur and that the only remaining action to be taken by the Court is the imposition of sentence.

Defendant and his attorney have reviewed the government's evidence and discussed the government's case. Further, they have discussed possible defenses and defense witnesses. Defendant is satisfied that his attorney has provided effective assistance of counsel.

9. PRESENTENCE INVESTIGATION REPORT

Defendant understands that the Court will order the Probation Office to prepare a Presentence Investigation Report following his guilty plea. The parties reserve the right to allocution at sentencing and the right to bring any misstatements made by any party or on that party's behalf to the attention of the Court at the time of sentencing.

10. FACTUAL BASIS FOR THE PLEA

As to Count One, Defendant knowingly and intentionally distributed 0.23 grams of cocaine base (crack) to an undercover St. Louis Metropolitan Police officer on May 14, 2003. The distribution occurred in the area of Itaska and 37th Street in the City of St. Louis, which is within the Eastern District of Missouri. Defendant exchanged a clear plastic bag containing cocaine base (crack) for a $20 bill. He was arrested immediately after this transaction.

As to Count Two, Defendant knowingly and intentionally possessed 5.03 grams of cocaine base (crack) on November 2, 2003. While standing on the front porch at 3455 Oregon, in the City of St. Louis, which is within the Eastern District of Missouri, Defendant threw a clear

plastic bag, which appeared to contain cocaine base (crack), in the presence of two St. Louis Metropolitan Police officers, who were approaching the porch. After tossing the bag to the ground, Defendant entered 3455 Oregon. He remained inside for a short period before exiting the rear of the residence and fleeing from the police on foot. Police retrieved the bag they had seen Defendant toss from the front porch of 3455 Oregon and, after laboratory analysis, determined that it contained 5.03 grams of cocaine base (crack).

11. **SENTENCING GUIDELINES:** The parties' position on application of the Guidelines is as follows, with both parties understanding that their recommendations are not binding upon the Court:

A. **Guidelines Manual to be Used:** The Parties recommend that the 2004 version of the Sentencing Guidelines Manual applies:

B. **Base Offense Level:** The parties recommend that Sentencing Guidelines §2D1.1 be used as the Chapter Two Offense Guideline. Under this Guideline's Drug Quantity Table, §2D1.1(c)(7), the parties recommend a base offense level of 26 based on the aggregate 5.26 grams of cocaine base crack for which Defendant is responsible under Counts One and Two.

C. **Specific Offense Characteristics:** The parties disagree whether Defendant qualifies for the "safety valve", Sentencing Guidelines §2D1.1(b)(7). The parties recommend that no other specific offense characteristics apply.

D. **Chapter Three Adjustments**

1. **Reckless Endangerment During Flight:** The parties disagree whether the adjustment for

reckless endangerment during flight, Sentencing Guidelines §3C1.2, applies to Defendant.

2. **Acceptance of Responsibility:** The parties recommend that Defendant receive a two-level downward adjustment for acceptance of responsibility under Sentencing Guidelines §3E1.1(a). The government's agreement to this recommendation is based on the information known as of the date of Defendant's guilty plea. If the government later learns of information that it believes is inconsistent with Defendant's acceptance of responsibility, it reserves the right to argue that Defendant should not receive this downward adjustment.

The parties disagree whether Defendant qualifies for an additional one-level downward adjustment under Sentencing Guidelines §3E1.1(b).

3. The parties recommend that no other Chapter Three adjustments apply.

E. **Criminal History:** The parties make no recommendation concerning Defendant's criminal history.

12/3/04 /s/ Christian M. Stevens
Date Christian M. Stevens
Assistant United States Attorney

12-03-04 /s/ Mario Claiborne
Date Mario Claiborne
Defendant

12/3/04 /s/ Michael Dwyer
Date Michael Dwyer
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
Plaintiff, v.	)	Case No. S1-4:04 CR 423 DJS
MARIO CLAIBORNE	)	
Defendant.	)	

DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT

(Filed Mar. 11, 2005)

Defendant Mario Claiborne, through his attorney, Assistant Federal Public Defender Michael Dwyer, objects as follows to the Presentence Investigation Report (PSR), which was prepared before the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and consequently, treats the Guidelines as mandatory without regard to the statutory factors in 18 U.S.C. § 3553(a), which now govern sentencing.

I. Sentencing Principles Post-*Booker*

In *Booker*, the Court held that *Blakely v. Washington* applied to the federal sentencing guidelines, and that the Sixth Amendment's jury trial guarantee prevented judges from finding facts that exposed a defendant to increased prison time. *Booker*, 125 S.Ct. 738, 745. As a remedy, a different majority of the Court excised the provision of the Sentencing Reform Act that made the guidelines mandatory, 18 U.S.C. § 3553(b)(1). *Id.* at 764. This remedial majority held that district courts must still consider the

guideline range, 18 U.S.C. § 3553(a)(4) and (5), but must also consider the other statutory concerns in § 3553(a). *Id.* at 757-69 Thus, after *Booker*, the guidelines are just one of a number of sentencing factors.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." 18 U.S.C. § 3553. Section 3553(a)(2) states that such purposes are: (A) to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence, (C) to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See Id.* Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (4) the sentencing range established by the guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. *See id.*

Thus, courts may no longer uncritically apply the guidelines. *See United States v. Ranum*, 353 F.Supp.2d 984, 985 (E.D.Wis. 2005). In every case, courts must now consider not just the Guidelines but *all* of the § 3553(a) factors, many of which the guidelines previously required

courts to reject or ignore.[1] In sum, "*Booker* is not as an invitation to do business as usual." *Id.* at 987. District courts must sentence the person before them as an individual.

A. Application to Mr. Claiborne's Case

1. ***Nature of the Offense.*** The offense conduct consists of Mr. Claiborne's distribution of less than a quarter gram of crack, .23 grams, on May 14, 2003 and possession of 5.03 grams of cocaine base on November 2, 2003. The seriousness of these offenses is mitigated by the relatively small drug quantity involved, which is just barely above the five-year mandatory minimum threshold quantity and far below the median for the majority of crack cocaine offenders.

Lower drug quantities correspond to lower culpability as defined by offender function. *See* United States Sentencing Commission, Report to the Congress, Cocaine and Federal Sentencing Policy, at p. 45 (May 2002).[2] Smaller scale street level dealers wield little decisionmaking authority and have limited responsibility. *Id.* at 99-100. The 2002 Report reflects the median drug quantity

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[1] For instance, under § 3553(a)(1), the court must consider a defendant's "history and characteristics", yet under the Guidelines, the court was generally forbidden to consider a defendant's age, U.S.S.G. § 5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties and responsibilities, § 5H1.6, his socio-economic status, § 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, § 5H1.12.

[2] Available at www.ussc.gov (United States Sentencing Commission website).

involved for street-level crack dealers who make up the majority of crack cocaine offenders was 52 grams, ten times the amount that Claiborne has accepted responsibility for. *Id.* at 46.

2. *History and Character of the Defendant*

Mr. Claiborne's history and character weigh heavily in his favor. During his upbringing, Mario's parents separated when he was eight years old. He was unable to live with his father with whom he had a close relationship. He would visit him on weekends and during the summer. From kindergarten through eighth grade, he attended six different elementary schools. He failed third grade, finally dropping out of school in the ninth grade. At age 13, he began working in his father's business. He currently works full time, earning $7.67 an hour as a sorter at National Linen.

Now age 21, Claiborne has been in a stable relationship with the same woman, Ericka Fields, for 3 years. They have two children, Morieonn, age one, and Marieonna, age seven months. Ms. Fields has a three-year old child, Antonio, from a prior relationship, but Antonio's biological father neither maintains contact nor provides financial support. Claiborne has effectively shouldered and discharged this responsibility. He is the only father Antonio has known. Devoted to his family, Claiborne provides both financially and emotionally for Ms. Fields and all three children. She works full time at Family Value Center, earning $6.30 an hour. This close-knit family's stability depends on Defendant's continued presence, and his emotional and material support. His absence would have a profound impact on them. From a family and

employment standpoint, Mario has done all of the right things.

Claiborne has zero criminal history points (criminal history category (CHC) of I). Based on his history and his character, he is not a danger to society. The Sentencing Commission's research study on recidivism rates of Guideline offenders concluded that "offenders with zero criminal history points have lower recidivism rates than offenders with one or more criminal history points." *See* U.S.S.C., "Recidivism and the 'First Offender,'" 17 (May 2004).[3] "All offenders with zero criminal history points have a primary recidivism rate of 11.7 percent. This zero point recidivism rate is substantially lower than the recidivism rates for offenders with only one criminal history point (22.6%) or for offenders with two or more points (36.5%) combined in the CHC II through CHC VI column." *Id.*, at 13-14.

3. Needs of the Public

Claiborne's offense did not involve acts that have been associated with higher levels of culpability; such as, using or carrying a gun for self-protection, causing serious bodily injury to an individual, involving a juvenile or distributing drugs in proximity to a school. Therefore, a lengthy period of incarceration is not necessary to protect the public.

Attorney General Alberto Gonzales during his recent confirmation hearings asserted that prison is best suited "for people who commit violent crimes and are career criminals," and he also stressed that a focus on rehabilitation for "first-time, maybe sometimes second-time

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[3] Available at ussc.gov/publicat/Recidivism_FirstOffenderpdf.html

offenders . . . is not only smart, . . . it's the right thing to do." Transcript of the Senate Judiciary Committee's hearings on the nomination of Alberto R. Gonzales to be attorney general.[4]

4. Advisory Guidelines

As *Booker* directs, in determining Defendant's sentence, this court must consider the advisory Guidelines. Under section 2D1.1(a)(3), the base offense level for a total of 5.26 grams of cocaine base (crack) involved in the two counts is Level 26. *See* U.S.S.G. § 2D1.1(c)(7).

Offense level 26 seriously overstates the seriousness of the offense and Claiborne's lowlevel culpability. The Sentencing Commission has itself powerfully concluded that "*the Commission firmly and unanimously* believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 [Anti-Drug Abuse] Act." *See* United States Sentencing Commission, Report to the Congress, Cocaine and Federal Sentencing Policy at 91 (2002) (emphasis added).[5] The 1986 Act created the five and 10 year mandatory minimum penalties applicable to federal drug trafficking offenses. The Act also established the 100:1 drug quantity ratio between powder and crack cocaine, that the Commission concluded firmly and unanimously, "cannot be justified." *See* United States Sentencing Commission,

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[4] Available at: www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html

[5] Available at: ussc.gov/r_Congress/02Crack/2002crackrpt.html

Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997).[6]

The Commission responded to the Act by incorporating the statutory mandatory minimum sentences into the guidelines. It used the mandatory minimum quantities to calibrate the drug-quantity table, selecting offense levels 26 and 32 in which the bottom of the range was greater than the mandatory minimum.[7] Congress, in establishing the 5 and 10 year mandatory minimums, indicated that they were intended for first time offenders who are "serious" ("the managers of the retail traffic") and "major" drug traffickers ("manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities"). *Id.* at 99.

The legislative history indicates that

> The Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that

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[6] Available at: ussc.gov/r_Congress/NEWCRACK.pdf

[7] Offenses involving 5 grams or more of crack were assigned a base offense level 26 corresponding to a guideline range of 63 to 78 months for a first time offender in criminal history category I (a guideline that just exceeded the 5-year statutory minimum for such offenses). Similarly, offenses involving 50 grams of crack corresponded to an offense level 32.

> might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 99-845, at 11-12 (1986).

Because Claiborne's role was not that of a leader or manager, but a small street-level retail trafficker, level 26 seriously overstates his offenses and his culpability. This factor is relevant to the statutory purposes of sentencing under section 3553(a). The *Booker* remedy enables this Court to give greater consideration to this overstatement in its assessment of the reasonableness of the proposed Guideline range, in conjunction with the nature and circumstances of the offense and characteristics of Claiborne.

5. Claiborne is safety valve eligible.

Sentencing Guidelines section 2D1.1(b)(6) instructs that for specified offenses, "[i]f the defendant meets the [safety valve] criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.1(a) . . . [the court shall] decrease by two levels" defendants' total offense level. The safety valve statute, 18 U.S.C. § 3553(f), provides that for various drug offenses, a district court "shall impose a sentence . . . without regard to any statutory minimum sentence" if the defendant meets five statutory criteria. 18 U.S.C. § 3553(f); *see also* §5C1.2 (incorporating statutory criteria).

The PSR establishes that Claiborne has satisfied the first four safety valve criteria: (1) he has no criminal history points; (2) he did not threaten to use, or use any, violence or possess any type of weapon; (3) the offense did not result in any injury, let alone serious bodily injury or death; and (4) he did not function as a supervisor,

manager, leader, or organizer of others in the offense. *See* § 3553(f)(1)-(f)(4) The fifth and final criteria provides that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all of the information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement" 18 U.S.C. § 3553(f)(5). The statute does not require that the defendant's truthful disclosure come in any specified form, place, or manner.

Claiborne's attorney has informed the government that Claiborne stands ready to satisfy the fifth criteria in any manner the government chooses. Believing that Claiborne does not qualify for the safety valve, the government chose not to meet with him. Assistant United States Attorney Christian Stevens, who represents the government in this case, said that Claiborne could submit a written statement through his attorney. Claiborne's attorney will do so separately by letter, but Claiborne remains open to any other means to demonstrate that he can satisfy the final safety valve criteria.

Upon satisfaction of all five criteria, Claiborne must be sentenced without regard to the otherwise applicable five-year mandatory minimum sentence, and he should receive an additional two-level reduction in the total offense level. *See* U.S.S.G. §5C1.2.

6. The enhancement for reckless endangerment during flight is not justified.

The PSR erroneously asserts that Claiborne "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. . . . " PSR at 4. Consequently, it erroneously adds two levels under the Chapter Three Adjustment for Reckless Endangerment During Flight. *See id.*; Sentencing Guidelines §3C1.2.

The information in the PSR falls far short of establishing, much less proving beyond a reasonable doubt, that Claiborne created any risk of death or serious bodily injury, let alone a substantial risk. Because this is an aggravating adjustment under Chapter Three, the government bears the burden of proof on this issue, and Claiborne believes that the applicable standard of proof is the beyond-a-reasonable-doubt standard.

After police saw Claiborne on the front porch at 3455 Oregon, he fled on foot, running north on Oregon. A short distance away, at 3429 Oregon, the front door to the residence was open. Claiborne ran into the open door, through the house, and out the rear door. There is no evidence that he touched anyone as he ran into or through the house. Nothing in the PSR suggests that Claiborne threatened or assaulted anyone in the process of entering or leaving 3429 Oregon. Although the PSR asserts that 3429 Oregon "was occupied by Mary Clemons, and several of her grandchildren,[8] Claiborne believes that this assertion is incorrect. Clemons and three of the children (not grandchildren) were outside, in the front of the residence,

[8] PSR at 2.

as Claiborne entered and departed. Clemons's children's ages are 18, 15, 12, and 11. Claiborne was in the house only for the length of time it takes to run from the front door to the back door. No weapons were displayed or discharged during the pursuit, and the government has never suggested that Claiborne was armed.

Under any standard of proof, these facts fail to establish the "substantial risk of death or serious bodily injury to another person" that section 3C1.2 explicitly requires. *See* Sentencing Guidelines §3C1.2. After *Booker*, however, Claiborne believes that the government bears the burden of establishing a section 3C1.2 adjustment beyond a reasonable doubt. In his separate opinion, Justice Thomas observed:

> The commentary to [Sentencing Guidelines] § 6A1.3 states that "[t]he [Sentencing] Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

Booker, 125 S. Ct. at 798 n.6 (Thomas, J., dissenting in part). Similarly, Judge Bataillion in Nebraska concluded that post-*Booker*,

> [t]he Due Process Clause is implicated whenever a judge determines a fact by a standard lower

> than "beyond a reasonable doubt" if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact. *Id.* at 754-55; *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348. *Booker* does not alter these due process constraints on sentencing. *See Blakely*, 124 S.Ct. at 2539-40."

United States v. Huerta-Rodriguez, 2005 WL 318640 (D. Neb. Feb. 1. 2005) (footnote omitted). A finding of reckless endangerment under Sentencing Guidelines section 3C1.2 is such a fact and, therefore, the government's burden in Claiborne's case requires proof beyond a reasonable doubt.

That the facts found in the PSR fall far short of proving reckless endangerment is evident when one looks at case law concerning section 3C1.2. Unlike Claiborne's extremely brief transit from the front to the back of the Clemons residence, the more typical case involves dramatically more egregious conduct. In *United States v. Cook*, 356 F.3d 913, 917 (8th Cir. 2004), for example, the defendant drove through a residential area while intoxicated, crossed an intersection through oncoming cross-traffic, abandoned his car, charged into a stranger's home to hide, and required police to enter the house at gunpoint and arrest him in the presence of a mother and her seven children. *See* 913 F.3d at 917. As in *Cook*, reckless endangerment typically involves police pursuit of a defendant fleeing at high speed in a motor vehicle. *See United States v. Moore*, 242 F.3d 1080, 1081 (8th Cir. 2001) (defendant fled police, drove 80 to 100 mph, ran two red lights, and swerved in and out of traffic on a busy highway); *United States v. Valdez*, 146 F.3d 547, 553-54 (8th Cir. 1998) (defendant fled by driving 70 to 80 mph on gravel road for over four miles with three state troopers in pursuit, waved

shotgun during chase, and police fired at fleeing truck); *United States v. Sykes*, 4 F.3d 697, 700 (8th Cir. 1993) (police had to force defendant's speeding vehicle off road to apprehend him); *United States v. Pierce*, 388 F.3d 1136 (8th Cir. 2004) (defendant rammed police vehicle with his truck multiple times and then collided with parked cars); *see also United States v. Goolsby*, 209 F.3d 1079, 1081 (8th Cir. 2000) (defendant pushed minor child, who was in his care, into path of oncoming police vehicle as he fled officers attempting to execute search warrant). Other cases involve a loaded guns pointed at police officers. *See United States v. Rice*, 184 F.3d 740, 742 (8th Cir. 1999) (defendant pointed loaded gun at uniformed officers executing a search warrant); *United States v. Santiago RivasGomez*, 2002 WL 21942 (8th Cir. 2002) (unpublished) (defendant aimed his gun at a pursuing officer and pulled the trigger).

Claiborne's conduct contrasts sharply with these cases. His unarmed flight threatened no one. He was on foot, not in a vehicle. He exited 3429 Oregon immediately after entering. In these circumstances, the reasoning of *United States v. Reyes-Oseguera*, 106 F.3d 1481 (9th Cir. 1997) should apply. The court "reiterate[d] the rule that instinctive flight on foot from law enforcement *is insufficient on its own* to justify the application of section 3C1.2. The guidelines contemplate that some additional conduct must create a substantial risk." *Id.* at 1483 (emphasis added). The court then applied this rule in reviewing the district court's conclusion that ReyesOseguera should receive the reckless endangerment adjustment because "(1) Reyes-Oseguera fled law enforcement officers on foot; and (2) an armed law enforcement officer pursued, tackled, and subdued Reyes-Oseguera." *Id.* at 1484. It concluded

that the government had failed to prove reckless endangerment:

> Reyes-Oseguera's instinctive flight alone will not support the enhancement, nor will the armed agent's pursuit. Most flight will draw pursuit, and most law enforcement officers are armed. To hold that a defendant recklessly endangers another solely because he is pursued by an armed agent is the functional equivalent of finding instinctive flight sufficient. We are also wary of attributing an awareness of the actions of law enforcement officials to suspects who are in the midst of instinctive – and therefore not reasoned or contemplative – flight.

Id. Like Reyes-Oseguera, Claiborne did not "recklessly create[] a substantial risk of death or serious bodily injury to another person." Sentencing Guidelines §3C.1.2.

7. The Applicable Guidelines

The PSR has calculated a guideline range of 60 to 71 months which does not reflect Mr. Claiborne's eligibility for the safety valve. PSR, at 7. After a 2-level safety valve reduction, and a 3-level reduction for acceptance of responsibility, the advisory Guideline range is properly computed at 37 to 46 months, based on a total offense level of 21 and Criminal History Category I. This range, however, reflects the serious overstatement of the offense resulting from the 100:1 crack/powder ratio discussed above. Had Claiborne possessed only powder cocaine, his offense level would have dropped to level 12 and after a 2-level reduction for acceptance of responsibility, resulted in a guideline range of 6 to 12 months. Taking into account all of the information in these objections, Claiborne

believes that the 37 to 46 month range is unreasonable under the circumstances and requests a lower sentence to reflect the true seriousness of his crime and the nature and circumstances of his life experience.

Dated March 11, 2005.

Respectfully submitted,

/s/ Michael Dwyer
MICHAEL C. DWYER
Federal Public Defender
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Attorney for Defendant Claiborne

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**No. S1-4:04CR423 DJS**
MARIO CLAIBORNE,	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT

(Filed Mar. 25, 2005)

COMES NOW the United States of America, by and through its attorneys, James G. Martin, United States Attorney for the Eastern District of Missouri, and Cristian M. Stevens, Assistant United States Attorney for said District, and for its sentencing memorandum and response to defendant's objections to the presentence report states as follows:

I. INTRODUCTION

According to the presentence investigation report ("PSR") of the United States Probation Office, defendant's sentencing range is 60 to 71 months in prison. This range results from, among other things, a two-level upward adjustment pursuant to Sentencing Guidelines § 3C1.2 for reckless endangerment during flight, and defendant's failure to qualify for the so-called "safety valve" pursuant to Sentencing Guidelines § 5C1.2(a) and 18 U.S.C.

§ 3553(f). The Government hereby files its sentencing memorandum in support of the PSR and respectfully requests that the Court impose a sentence within the recommended sentencing range.

Defendant Mario Claiborne ("defendant") objects to the PSR on the bases that: the PSR treats the Sentencing Guidelines as mandatory, despite that the Supreme Court's decision in *United States v. Booker,* 125 S.Ct. 738 (2005), renders the guidelines advisory; defendant qualifies for the safety valve; and the two-level upward adjustment for reckless endangerment during flight must be proved beyond a reasonable doubt.

Defendant's objections should be denied. First, defendant's argument that the advisory Sentencing Guidelines and defendant's "history and character" weigh in favor of a sentence below the guideline range of 60 to 71 months is incorrect both legally and factually. Although the Sentencing Guidelines were rendered advisory in *Booker,* the bottom of defendant's sentencing range is the *statutory* mandatory minimum of 60 months found in 21 U.S.C. § 841(a). Furthermore, for all defendant's talk of his lack of recidivism, this case involves two counts for *two separate arrests* on May 14, 2003, and November 2, 2003, both involving cocaine base.

Second, defendant does not qualify for the safety valve. Defendant misrepresents that the Government "chose not to meet with" defendant for a safety valve proffer in an attempt to explain defendant's failure comply with that requirement to date. In any event, defendant does not meet the safety valve criterion that he "did not use violence or credible threats of violence" in connection with the offense to which he pleaded guilty. As defendant

concedes in his objection, defendant fled through the home of a grandmother and her grandchildren with armed police officers in hot pursuit.

Finally, for much the same reason, the two-level adjustment pursuant to Sentencing Guidelines § 3C1.2 applies for reckless endangerment during flight. Whether or not defendant's flight into Mary Clemons' home amounts to a "threat of violence" for the purpose of the safety valve, it certainly "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2.

For all of these reasons, defendant's objection should be denied and defendant should be sentenced within the sentencing range set forth in the PSR.

II. ARGUMENT

A. Defendant Should be Sentenced Within the Sentencing Range.

Defendant's first argument states the obvious: the Supreme Court rendered the Sentencing Guidelines advisory in *United States v. Booker,* 125 S.Ct. 738 (2005). That the Sentencing Guidelines are advisory is a moot point in this case, however, because the bottom of defendant's sentencing range is the *statutory* mandatory minimum of 60 months found in 21 U.S.C. § 841(a). PSR ¶ 48. The quantity of cocaine base subjecting defendant to the mandatory minimum under § 841(a) was found by the grand jury in the indictment and conceded by defendant in the stipulation of facts to which he pleaded guilty.

Still, defendant argues that his "history and character" weigh in favor of a sentence below the guideline range. Defendant waxes poetic for several pages about his devotion to, and financial support of, his family, and even asserts that he "has done all the right things." Then, defendant argues that, based on his lack of criminal history and his sterling character, he is not a danger to society. For all the discussion of recidivism rates, defendant fails to mention that this Court need look no further than the offenses to which defendant pleaded guilty to grasp defendant's propensity for recidivism. Defendant sold cocaine base on May 14, 2003, and possessed more than five grams of cocaine base only six months later, on November 2, 2003. Defendant's self-description as a "small street level retail trafficker" makes clear the means by which he has provided the asserted financial support of his family. Thus, even were the bottom of the sentencing range in this case discretionary, the proper sentence still would be within the prescribed range of 60 to 71 months.

B. Defendant Does Not Qualify for the Safety Valve.

Defendant does not qualify for the safety valve. To qualify for the safety valve, a defendant must meet the following conditions:

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;

> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . ; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or a common scheme or plan. . . . 18 U.S.C. § 3553(f) (1)-(5); U.S.S.G. § 5C1.2(a)(1)-(5).

Defendant misrepresents that the Government "chose not to meet with" defendant for a safety valve proffer, pursuant to § 3553(f)(5) and § 5C1.2(a)(5). The truth of the matter is that defense counsel recently called the undersigned regarding a safety valve proffer. The undersigned indicated that defendant did not meet the criteria for the safety valve, but that in the event that the Court determined otherwise, the Government was willing to conduct a safety valve proffer before the sentencing hearing. Defense counsel then offered to submit the proffer in writing, and the undersigned agreed to accept a written proffer. To date, defense counsel has not submitted a written proffer of information, nor produced defendant for a proffer discussion. Defendant bears the burden of proof regarding this safety valve requirement. *United States v. Surratt,* 172 F.3d 559, 566 (8th Cir. 1999).

In any event, defendant otherwise has failed to meet the safety valve criteria. That is, defendant cannot fulfill the criterion that he "did not use violence or credible threats of violence" in connection with the offense. *See* 18 U.S.C. § 3553(f)(2); U.S.S.G. § 5C1.2(a)(2). As defendant concedes in his objection, defendant fled into the home of a grandmother and her grandchildren, who did not know defendant, with armed police officers in hot pursuit. Such conduct involved a "threat of violence," as that phrase

properly is understood. *See American Heritage Dictionary* 1801 (4th ed. 2000) (defining "threat" as "an indication of impending danger or harm."); *Webster's New World Dictionary* (3d ed. 1988) (defining "threat" as "an indication of imminent danger, harm, evil, etc.").

C. The Adjustment for Reckless Endangerment During Flight Applies.

Due to the same, apparently uncontested conduct of defendant, the two-level enhancement pursuant to Sentencing Guidelines § 3C1.2 applies for reckless endangerment during flight. Whether or not defendant's flight through the home of Mary Clemons, to whom defendant was a stranger, amounts to a "threat of violence" for the purpose of the safety valve, it "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2.

A person is "reckless" under the Sentencing Guidelines when he "was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation." U.S.S.G. § 2A1.4 Commentary n.1; *see also United States v. Luna,* 21 F.3d 874, 885 (9th Cir. 1994) (citing U.S.S.G. § 2A1.4 definition of "reckless" and affirming district court's application of reckless endangerment adjustment because defendant abandoned a running car in a residential area and fled on foot); *United States v. Blake,* No. 93-3421, 1994 WL 318950, at **2 (7th Cir. June 28, 1994) (unpublished) (citing U.S.S.G. § 2A1.4 definition of "reckless" and affirming district court's application of

reckless endangerment adjustment because defendant jumped on moving cars while fleeing from police on foot). Based on the above definition, and supporting cases, defendant's conduct in fleeing into Mary Clemons' home constituted "a gross deviation" from ordinary care.

In turn, defendant's gross deviation from ordinary care "created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." *See, e.g., United States v. Hampton,* 100 Fed. Appx. 792 (10th Cir. 2004) (holding district court did not err in applying reckless endangerment adjustment because armed defendant fled on bicycle and on foot and attempted to enter home of stranger); *United States v. Winston,* 97 Fed. Appx. 785 (9th Cir. 2004) (holding district court permissibly applied reckless endangerment adjustment because armed defendant fled on foot into stranger's apartment).

Finally, defendant's reliance on a dissenting opinion in *Booker* for his argument that the Government must prove reckless endangerment beyond a reasonable doubt is misplaced. The *Booker* majority rendered the Sentencing Guidelines advisory precisely to avoid placing Fifth and Sixth Amendment constraints on guideline sentences. See *Booker,* 125 S.Ct. at 764 (2005) (explaining that excision of 18 U.S.C. § 3553(b)(1), which makes the Sentencing Guidelines mandatory and imposes binding requirements on all sentencing judges, removes the sentencing statute from *Apprendi*'s purview). In any event, defendant's conduct implicating the upward adjustment for reckless endangerment is set forth in the PSR and conceded in defendant's objections.

For all of these reasons, the PSR correctly recommends a two-level upward adjustment for reckless endangerment during flight pursuant to Sentencing Guidelines § 3C1.2.

III. CONCLUSION

WHEREFORE, the Government respectfully requests that this Court deny defendant's objections to the presentence report, and sentence defendant within the sentencing range set forth in the PSR.

Respectfully submitted,

JAMES G. MARTIN
United States Attorney

s/ *Cristian M Stevens*
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UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
MISSOURI EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff, v.	)	Case No. S1-4:04 CR 423
MARIO CLAIBORNE, CEJ	)	
Defendant.	)	

DEFENDANT CLAIBORNE'S REPLY TO THE GOVERNMENT'S SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT

(Filed Mar. 27, 2005)

Defendant Mario Claiborne, through his attorney, Assistant Federal Public Defender Michael Dwyer, replies as follows to the Government's Sentencing Memorandum and Response to Defendant's Objections to the Presentence Report (Government's Response).

1. The government incorrectly asserts that Defendant and Mary Clemons did not know each other. Clemons knew Claiborne from the neighborhood, and "they would acknowledge each other when passing by." Exhibit A (attached) (summary of September 14, 2004 interview of Clemons). She acknowledged telling the police on November 2, 2003, that she did not know Claiborne, but explained that the incident happened so quickly she didn't recognize Claiborne. *See id.* While not personal friends, Claiborne and Clemons were not strangers. *See id.* Consequently the government errs in asserting that they did not know each other or were strangers to each other. *See* Government's Response at 5.

2. The government cites four cases in support of its argument that Claiborne recklessly endangered others. *See* Government's Response at 56. These cases, however, are factually distinguishable and these differences support Claiborne's argument that his conduct did not "create[] a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. . . ." Sentencing Guidelines §3C1.2. The conduct involved in these case was, in contrast to Claiborne's, both violent and reckless.

A. The government cites to *United States v. Luna,* 21 F.3d 874, 885 (9th Cir. 1994). *See* Government's Response at 5. In *Luna,* the defendants, unlike Claiborne, were fleeing from an armed bank robbery during which patrons and tellers were verbally abused and ordered to lie on the floor. *See* 21 F.3d. at 876. The robbers also struck the bank manager in the face as they fled. *See id.* Fleeing in an automobile, they ran stop signs while being pursued by the police. *See id.* When the robbers abandoned the car, by jumping out, it was still moving, rolling over a curb, and coming to rest under a tree. *See id.* At one point during the flight, a police officer approached the car on foot. One of the robbers reached toward the car's floorboard, where police later found a firearm. *See id.* These facts are considerably more reckless and violent than suggested by the government's summary statement that in *Luna* a "defendant abandoned a running car in a residential area and fled on foot." Government's Response at 5-6.

B. In *United States v. Blake,* 1994 WL 318950 (7th Cir. June 28, 1994) (unpublished), the defendant did far more than merely run through an acquaintance's house:

Blake and the government entered into a factual stipulation pursuant to the plea agreement. The stipulation details that on May 18, 1993 Deputy United States Marshal Nicholas Mann went to the residence of the defendant's mother with an outstanding warrant for Blake's arrest. Upon arrival, Deputy Marshal Mann observed Blake fleeing, and yelled, "Stop! Police!" Blake continued to flee and Mann followed him, continually yelling for him to stop and identifying himself as a Deputy U.S. Marshal.

The foot pursuit continued onto Route 3 where it met with oncoming traffic. When Blake jumped onto the trunk of a moving car and fell off, Mann was able to overtake him and attempted to handcuff him. Blake forcibly pushed Mann off and away, ran back into traffic, jumped on the hood of a car and ordered the driver to drive. The driver refused. Mann then forcibly pulled Blake from the car and ordered him to lay down on the ground, a command repeated throughout the ensuing struggle. Blake charged, forcibly knocking Mann to the ground. Mann got up and attempted to restrain him. Blake continued to resist Mann by pushing him in the chest, neck, and shoulder areas. Blake forced Mann off and fled again.

The pursuit continued north to Adams Street, where Mann was able to overtake Blake and attempt to secure him against the trunk of a taxi cab. When the cab driver exited his car, however, Blake jumped into the driver's seat and attempted to put the running vehicle into gear. There were several children standing in front of the taxi. At this point, Mann drew his weapon and ordered Blake to stop. Mann then handcuffed one of Blake's wrists, though the Blake

> continued to fight. Finally, Mann secured both of Blake's hands behind his back and handcuffed him to the steering wheel of the taxi.

Id. at **1. Again, these facts demonstrate far more reckless, violent behavior than the government's summary ("defendant jumped on moving cars will fleeing from the police on foot") suggests. Government's Response at 6.

C. Similarly, in *United States v. Hampton*, 2004 WL 1249787 (10th Cir. June 8, 2004) (unpublished), the defendant's conduct was far more reckless and violent than the government's summary suggests ("armed defendant fled on bicycle and foot and attempted to enter home of stranger"). Government's Response at 6. In *Hampton,* the defendant fled from a shooting and tried to force his way into a stranger's home at gunpoint. *See Hampton,* 2004 WL 1249787 at **1.

> On the night of September 27, 2002, Tulsa police officers heard gun shots and shortly thereafter saw the defendant riding away from the vicinity on a bicycle. The officers ordered the defendant to stop, but the defendant ignored them. The officers pursued the defendant who rode into an apartment complex. After crashing on his bicycle, the defendant fled on foot.
>
> A twenty-one-year-old resident of one of the apartments testified at a grand jury hearing that as he was about to leave his apartment, he saw spot lights coming from police cars and heard someone running. The resident got scared and tried to shut his apartment door, but the defendant, who had run up to the door, started pushing against the door apparently in order to enter the apartment. The resident told his

> mother and three younger siblings to go upstairs. After struggling for about two minutes against the defendant's efforts to enter the apartment, the resident got tired and let the door open halfway. The resident testified that the defendant then stuck his arm into the apartment and handed the resident a loaded gun. Then, the defendant threw a few empty bullet shells on the apartment floor and tried to flee. He was immediately apprehended by police officers. The police officers testified that they saw the defendant remove the gun from his waistband while he was pushing against the door.

Id.

D. In the fourth case that the government relies on, *United States v. Winston,* 2004 WL 1197412 (9th Cir. May 20, 2004) (unpublished), the court does not provide the facts of the case. *See id.* at **1. This unpublished memorandum remanded the case to the District court on grounds other than the reckless endangerment issue. However, it was apparently agreed that the defendant, unlike Claiborne, was armed during his flight. *See id.*

3. As to the safety valve, a defendant must show that he or she has "not later than the time of the sentencing hearing, . . . provided to the Government all information and evidence the defendant has concerning the offense. . . ." Sentencing Guidelines §5C1.2(5). Defendant believes he has satisfied this requirement by means of the letter to Assistant United States Attorney Cristian M. Stevens, who represents the government in this case. A copy of the letter is attached to this Reply as Exhibit C, and a signed copy will be hand-delivered to the government before the sentencing hearing.

WHEREFORE, for the reasons stated in this Reply and in Defendant's Objections to the Presentence Investigation Report, he requests that the Court find that (1) the safety valve applies in his case and (2) that he did not reckless endanger others within the meaning of Sentencing Guidelines §3C1.2.

Dated March 27, 2005.

Respectfully submitted,

/s/ Michael Dwyer
Assistant Federal Public Defender
1010 Market Street – Suite 200
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Fax: 314 421 3177
E-Mail: Michael_Dwyer@fd.org
Attorney for Defendant Claiborne

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Exhibit A

Office of the Public Defender
Eastern District of Missouri

MEMORANDUM

TO: Michael

FROM: Ernie

DATE: September 14, 2004

RE: U.S. v. Mario Claiborne – Phone Interview with Witness Mary Clemons

****

On today's date at 8:45 a.m. I called Mrs. Clemons at 314-773-2450 in response to a voice mail message she had left on my office voice mail.

There was a previous attempt on September 13, 2004 to interview Mrs. Clemons at her residence at 3429 Oregon, St. Louis, Missouri 63118; she was not home, and I left business cards on the residence door.

When calling her this morning I was advised to call her at 314-771-6247 and she stated the following:

On the date of the incident she was seated on her front steps to 3429 Oregon with her children and grandchildren. Mrs. Clemons said that there were many other residents including children outside. Mrs. Clemons also had her front door wide open. Mrs. Clemons heard one gunshot that caused excitement and residents in the street running into their homes for safety. She then saw the defendant run into her house through the front door before she and the children were able to, and she then entered her home; a few seconds later the police arrived who asked

her if the defendant entered her home and she told them that he had; Mrs. Clemons then asked the police to remove the defendant from her house, but Mrs. Clemons' daughter (Shadonna Clemons) who was cooking in the kitchen near the back door said that the defendant went out the back door.

Mrs. Clemons had told the police that she did not give permission to the defendant to enter her home. Mrs. Clemons did tell the police that she did not know the defendant (she explained to me that she didn't recognize the defendant during the incident because it happened so quickly). Mrs. Clemons does not personally know the defendant, but she has seen him in the neighborhood and they would acknowledge each other when passing by.

Exhibit B

Office of the Public Defender
Eastern District of Missouri

MEMORANDUM

TO: Michael

FROM: Ernie

DATE: September 28, 2004

RE: U.S. v. Claiborne – Phone Interview – Witness Mary Clemons

****

Today at 10:20 a.m., I contacted Mrs. Clemons by phone at 314-773-2450. I have contacted and interviewed this witness in the past.

Mrs. Clemons said that her daughter Shadonna Clemons (18 years old) was in the house in the kitchen cooking. Mrs. Clemons' other children who were outside with her during the incident are Keisha (15 years old), Kadeem (12 years old), Leon (11 years old). I asked Mrs. Clemons who Danielle is and she said that she was someone who stayed at her home, but is not related.

I asked Mrs. Clemons about interviewing her children and she said since they are in school and involved in extracurricular activities that she will need to contact me when I can interview them.

Mrs. Clemons also said that the defendant, who was running, entered her home before she was able to gather her children to get them inside for safety. Mrs. Clemons said that the only person in her home was her daughter Shadonna who was in the kitchen cooking. After the defendant ran into her home Mrs. Clemons and her children then entered and shortly thereafter the police arrived.

Exhibit C

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF MISSOURI
1010 Market St.
Suite 200
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(314) 241-1255
FAX (314) 421-3177

NORMAN S. LONDON
FEDERAL PUBLIC DEFENDER

MICHAEL DWYER
ASSISTANT FEDERAL PUBLIC DEFENDER

March 27, 2005

Mr. Cristian M. Stevens
Assistant United States Attorney
111 S. 10th Street, Room 20.333
St. Louis, Missouri 63102

SUBJECT: United States v. Mario Claiborne, Case No. S1-4:04 CR 423 CEJ

Dear Mr. Stevens:

I am writing to follow-up on our previous telephone conversation concerning the applicability of Sentencing Guidelines §5C1.2 and §2D1.1(b)(7), the safety valve, to Mario Claiborne.

I understood that you believed that these sections were inapplicable in Claiborne's case because: (1) you believed he recklessly endangered others during the course of the offense and (2) you believed that this conduct constituted the use of violence or the threat of violence. On the basis of these beliefs (with which we disagree), you concluded that Claiborne was ineligible for the safety valve and did not wish to meet with Claiborne for the purpose of his satisfying the requirement in section

5C1.2(5) to provide the government with all his information and evidence concerning the offenses to which he pled guilty. You also said, however, that should the Court rule that Claiborne used or threatened violence, you would be willing to meet with Claiborne. Because we would not have a ruling from the Court on the question of violence before the sentencing hearing, I also suggested that I would provide you with information in writing in an attempt to satisfy section 5C1.2(5). This letter contains that information.

As to the May 14, 2003 incident, we do not disagree with any of the information in paragraphs 8 and 9 on page 2 of the Presentence Investigation Report. In addition to this information, Claiborne would tell you that he sold crack in the area of 37th and Itaska in the City of St. Louis for approximately two and a half months between either the end of February, 2003, or early March, 2003, until his May 14, 2003 arrest. He was there from about 9:00 p.m. to midnight or 1:00 a.m., almost every day. Often he was unable to sell anything because there were a large number of individuals selling in that area. Claiborne estimates that he was one of approximately 15 to 20 other crack sellers. Further, Claiborne was not from that neighborhood, and the other dealers resented his intrusion into their territory. He obtained his crack from a man named Shawn, whose last name he does not know. Claiborne would call Shawn, who would deliver the crack to him. He could obtain five or six rocks from Shawn for $50.00. He would try to sell each rock for $20.00.

As to the November 2, 2003 incident, there is less to tell. Claiborne came to 3455 Oregon that day to see a

friend, Black, who lived at that address. Black was not at home. A young man, Dewayne (Claiborne does not know his last name) was on the front porch of 3455 Oregon. Claiborne had not planned to meet with Dewayne, they encountered each other by happenstance. He had not previously dealt with Dewayne, although they knew each other as acquaintances. Dewayne offered to sell Claiborne the crack that was later seized. Claiborne took the bag of crack from him and had it in hand examining it when the police pulled up in front of 3455 Oregon.

I hope you believe, as I do, that this information satisfies Claiborne's obligation under section 5C1.2(5) to provide "not later than the time of the sentencing hearing . . . all information and evidence the defendant has. . . ."

Sincerely,

Michael Dwyer
Assistant Federal
Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
Plaintiff,	) Case No.
vs.	) 4:04-CR-423-DJS
MARIO CLAIBORNE,	) (Filed Apr. 21, 2005)
Defendant.	)

BEFORE THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
SENTENCING HEARING
MARCH 28, 2005

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[2] ST. LOUIS, MISSOURI, MARCH 28, 2005

10:00 a.m.

THE COURT: Good morning.

MR. STEVENS: Good morning.

THE COURT: This is United States v. Mario Claiborne. There were some objections to the Presentence Report, which I think we probably need to talk about first. And I have the government's response as well as the defendant's sentencing memorandum. I should also mention that this morning a letter that was addressed to Judge Stohr was forwarded to me. It is a letter written from a Ms. Reed, I believe – Arlene Reed. And she wrote in support of Mr. Claiborne. I don't know if you brought this over Mr. Dwyer, but I did have a chance to read this this morning.

MR. DWYER: Thank you, Your Honor, I did. When the court referred to our sentencing memorandum, was it referring to the reply to the government's response that we filed?

THE COURT: Yes. It was in reply to the government's response.

MR. DWYER: Thank you, Your Honor.

THE COURT: I guess it was the government who filed the sentencing memorandum, and you filed a reply to that okay. Yes, this is the one that you filed yesterday.

MR. DWYER: Thank you, Your Honor.

THE COURT: All right. As I understand it, there [3] are basically two objections that have any real

substance, one of which has to do with whether Mr. Claiborne qualifies for the safety valve. And the second is, you know, if he does, then I guess the second issue is whether his offense level should be recalculated.

And it's not entirely clear to me what the government's position is on one of the elements regarding the safety valve, and that has to do with whether the defendant has made an effort to provide information. And I am not sure what the government's position is on this.

MR. STEVENS: Well, judge, honestly, I don't think that's any longer an issue. Attached to Mr. Dwyer's reply of yesterday was a letter –

THE COURT: Right.

MR. STEVENS: – that the government has no problem accepting.

THE COURT: Okay.

MR. STEVENS: And I think it fits that requirement.

THE COURT: Okay.

MR. STEVENS: So that shouldn't be an issue today.

THE COURT: Okay. But this is still an issue of whether the there was violence or a threat of violence used by Mr. Claiborne, and that has to do with the circumstances that preceded his arrest; that is, his running through the home of a Mrs. Clemens (phonetic); and whether that [4] disqualifies him for the safety valve.

MR. DWYER: Yes, Your Honor.

THE COURT: Why don't you say what you have to say about that, Mr. Dwyer?

MR. DWYER: Well, Your Honor, I don't have much more to say than we offered in the two pleadings that we filed. I think it's clear that after he was spotted by the police and fled from them, he ran up the street a short distance. Mrs. Clements' door through her house was open. He ran past her. She was outside. He ran through the house; immediately exited the house through the rear door.

We know that, because Mrs. Clements' 18-year-old daughter was in the kitchen as Mr. Claiborne ran through the house. So the question is is his running down the street and running through an open door of Mrs. Clemens' house and immediately out the back door, does that qualify him for reckless endangerment during flight. And we've indicated with the case law that we cited in the objections and frankly we think that the case law that the government cited establishes this that when courts have said that a person recklessly endangered others in flight, the conduct was significantly more egregious than the conduct we have at issue in this case.

And I think it is important to make the distinction that we were not suggesting in any way that this was good [5] conduct or approved conduct. What I am saying is that the government, on the basis of what I understand the facts to be, has not proved that he used violence or threatened violence; a substantial risk of violence or threat of violence to others. And for that reason, I do not believe that the adjustment found in section 3(c)(1.2) – the reckless endangerment adjustment – applies to Mr. Claiborne's conduct.

THE COURT: The conduct, as I understand it, really the facts relating to the conduct really aren't in dispute. This was a situation where Mr. Claiborne was being chased by the police. He saw an opportunity which was essentially an open door to someone's home. Whether he knew the person or is not relevant, in my view. He wasn't invited in.

MR. DWYER: That's correct.

THE COURT: He ran through this lady's house and out through the back door, because the police were chasing him.

MR. DWYER: That's correct, Your Honor.

THE COURT: Okay. And the owner of the house was in her front yard at the time with some children, but there was an older daughter – an 18-year-old – who was inside the house in the kitchen –

MR. DWYER: Yes, Your Honor.

THE COURT: – at the time Mr. Claiborne ran through.

[6] MR. DWYER: Yes. That's correct, Your Honor.

THE COURT: He didn't have a gun. Or if he did, he didn't display one.

MR. DWYER: He did not have a gun, Your Honor. And there is no suggestion that I've seen anywhere that anybody thought he was armed.

THE COURT: He made no oral threats to anyone in the house? Okay. And he didn't hurt anybody

physically. He had no physical contact with anyone in the house.

MR. STEVENS: That's correct. That's correct, judge.

THE COURT: Okay.

MR. STEVENS: Judge, if I may, I would just point out in the memorandum filed as Exhibit A with the defendant's reply to the government's response, it does indicate – and I don't know that this is the case or not – Mrs. Clemens told me something: Similar that she heard a gunshot that caused excitement; and that they were attempting to get back in the house when the defendant ran through the door; that her daughter was inside; that he ran immediately past them as they were trying to get in the door of the house –

I don't dispute that the defendant did not make physical contact with anyone and didn't physically assault anyone, but I think that that may be an important fact. Also, judge, I have here – and I've given it to Mr. Dwyer [7] this morning – basically, I didn't intend to mark this. But with the memorandum that was attached to the defendant's reply, I think it might be at least worthwhile to point out to the court that Miss Clemens did appear at the grand jury, and I have provided this to Mr. Dwyer and indicated that this concerned her when he ran into her house, because she didn't know if he had a gun or if they would starting or whatever. "You know, one of me or my kids could have got shot." That what she said. Now, obviously, as you said, the defendant didn't display a gun at any time that I'm aware of, but that was Miss Clement's concern; whether that impacts the court's decision or not is obviously up to the Court. I am willing to submit that

grand jury testimony as a marked exhibit if you'd like, judge. But I would otherwise just proffer that portion of the grand jury testimony.

THE COURT: I'll accept your proffer on that. Thank you. Do you want to respond on the issue of whether this conduct qualifies Mr. Claiborne for this two level-increase in his offense level for, I guess, reckless endangerment if nothing else?

MR. STEVENS: Yes, judge, I would. I think honestly, judge, that that's a much stronger argument for the government. For Mr. Claiborne to not receive the safety valve, the Court would have to find he used violence or credible threats of violence or possessed a firearm.

[8] Now, there is no issue about him possessing a firearm, so far as the government is concerned. The issue is the use of violence or credible threats of violence, and that's a difficult standard to meet, I admit, under the circumstances of this case. But the reckless endangerment during flight is a much different standard. That would be that the defendant "recklessly created a substantial risk of the death or serious bodily injury to another person in the course of fleeing from a law enforcement officer."

I think that the undisputed facts here are, Your Honor, that this defendant ran past Miss Clemens and her grandchildren in front of the house; beat them inside the house to the front door; ran into the house; and that Miss Clemens' daughter was inside the house. The police officers were in hot pursuit of Mr. Claiborne, believing that he committed a felony, which he's pleaded guilty to, and followed him into that house.

Obviously, there is no dispute, I would think, that the police officers were armed. So Mr. Claiborne, in his flight from the police, by going into Miss Clemens' house, brought these armed police officers in hot pursuit in behind him. And I think that those circumstances really don't make this all that close of a case regarding reckless creating a substantial risk of at least serious bodily injury to someone in that house.

[9] THE COURT: Is there anything else on this?

MR. DWYER: Your Honor, I think that the facts show that he was in the house only momentarily. As the court indicated, we don't contest that he wasn't invited into the house. But the police learned immediately from Mrs. Clemens Mary Clements' daughter that Mr. Claiborne had exited the house through the back door immediately. And the police had time to talk to Miss Clemens out front, and it was she who invited the police or asked the police to go in the house.

So, you know, there are some timing suggestions here that I think belie this that there are police officers that are storming the house with loaded weapons drawn and ready to shoot at the defendant or anybody else in there. I don't think it is quite so dramatic. I think that the police pulled up out front; talked to Miss Clemens; and then went into the house at her invitation; learned immediately Shadona Clemens (phonetic) that the defendant had already left the house through the back door and in fact done so right after entering the house. And so that this wasn't an armed confrontation in any sense.

And, again, I think that what we're saying is that this did not create a substantial risk of death or serious bodily injury. That is a high standard, and I think that the cases

applying the adjustment reflect that the conduct to which this adjustment applies is much more egregious and much [10] more violent and reckless than was relevant in this case.

THE COURT: Thank you. Let's talk about the safety valve issue first because, obviously, if he's not safety valve eligible, whether this enhancement for reckless endangerment applies becomes less important. I don't say it's not relevant, but it becomes less important.

At issue here is whether Mr. Claiborne has satisfied all of the requirements of section 5(c)(1.2), which would allow the Court to sentence him below the mandatory 60-month sentence of imprisonment. And of course the safety valve provision in the guidelines is virtually identical to the statutory provision of section 3553.

The question is here is whether Mr. Claiborne did not use violence or a credible threat of violence in connection with this offense. And the information is undisputed that he did not make any oral threats of violence to any individual: Miss Clemens, her children, her daughter, or anyone. He did not display a weapon. He made no suggestion of committing a violate act. He was trying to get away. That was his goal.

He had no physical contact with anyone in the course of running through that house. And while going through someone's home uninvited under any circumstances but certainly under these circumstances is something that should not happen, I don't believe it rises to the level of "use of [11] violence or a credible threat of violence." There was no threat of violence at all.

I am sure that the young woman who was in the kitchen was quite disturbed and perhaps frightened by some stranger running through her home. But, again, that doesn't create a credible threat of violence. And, again, there was no actual use of violence. So I believe that, in light of the factors, Mr. Claiborne is entitled to be considered under the safety valve. And so the court is free to sentence him below the mandatory five-year minimum.

Now, that same conduct has to be evaluated in the context of section 3(c)(1.2) which provides that, "The defendant's offense level is to be increased by two levels if he created a substantial risk of death or serious bodily injury to any other individual in the course of fleeing from a law enforcement officer."

What is critical here is the language of section 3(c)(1.2). That language is written in terms of the creation of a substantial risk of death or a substantial risk of serious bodily injury. There doesn't appear to be any claim here that Mr. Claiborne presented a substantial risk of death to any individual based his conduct. And the information that I have, in my view, does not rise to the level of a substantial risk of serious bodily injury.

There is no information that has been presented to [12] me concerning the officers. I presume they were armed; but whether they had their guns drawn when they came to Mrs. Clemens' home or when he entered the home; whether there was some mention of a shot having been fired or Miss Clemens having heard a shotgun. There is no connection between that and the situation involving Mr. Claiborne. I don't know if the police were shooting at him or even what Mrs. Clemens heard was in fact a gunshot.

There isn't even enough information to tell me how much time passed between when Mr. Claiborne ran through the home and whether the police arrived; whenever they on are foot; were they in a car? How did they approach the house? How much time had passed? How long had he been gone? What were the police in so-called "hot pursuit" of this individual or were they just looking for him? It is not clear.

And because of this limited information, I don't believe that it has been shown sufficiently that Mr. Claiborne presented a substantial risk of death or substantial risk of bodily injury to any individual in the course of his flight from the police. So I will sustain the defendant's objection to the two-level increase of his offense level under section 3(c)(1.2). I believe those are all the objections. Right?

MR. DWYER: Yes, Your Honor.

THE COURT: Okay. And just so the record is clear, [13] while the Court gives consideration to the sentencing Guidelines, the Court is not required to follow them; however, I think that the guidelines are certainly instructive and will provide some guidance to the court in determining what's an appropriate sentence in this case.

Mr. Claiborne, do you want to step up to the podium, please? Mr. Claiborne, have you had enough time to read the presentence Report and discuss it with your lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. The Court will adopt the factual statements of the report as its Findings of Fact. Mr. Dwyer, is there any reason why sentence should not be imposed at this time?

MR. DWYER: No, Your Honor.

THE COURT: Mr. Stevens?

MR. STEVENS: No, Your Honor.

THE COURT: I am sorry. Mr. Claiborne, is there anything that you want to say before sentence is imposed?

THE DEFENDANT: No, ma'am.

THE COURT: Mr. Dwyer?

MR. DWYER: Thank you, Your Honor. With the Court's sustaining of the objection and deciding that the safety valve applies, I believe that looking at the Sentencing Guidelines for productive purposes in this case that the offense level would be 20 – excuse me – and that the criminal history category one. And under the Sentencing Guidelines, the range would be –

THE COURT: 46 to 57 months, I think. And I right?

MR. DWYER: Your Honor, I believe it would be 33 to 41.

THE COURT: Okay. What would his offense level come down to? He gets a reduction for the –

MR. DWYER: The Court are correct.

THE COURT: – for the 5(c)(1.2). Right?

MR. DWYER: You have demonstrated why I am a lawyer and not an accountant, Your Honor. It is 21, and Mr. Stevens is correct. And the Court was correct. It is 37 to 46, and that number we had used in our objections too. So thank you, Your Honor. That, as we indicated in our

objections, in light of Booker, we think that even the 37- to 46-month range is too high and would ask the Court to consider of the factors.

We've laid out those factors: The history and character of Mr. Claiborne; the needs of the public; the nature of this offense. And I want also we need to consider, you know, how the sentencing Commission crafted its guidelines in crack cases, which we've gone into in our objections. And I won't go through all of that again, Your Honor. I know that the court has read and considered that.

I would just make mention of a person who's no [15] longer with us, and I am thinking of Judge Cahill. And, you know, Judge Cahill and I didn't always agree on everything; and we had battles about what was appropriate and inappropriate in his courtroom. But I never left feeling he didn't consider justice his primary goal. And Judge Cahill used justice not in the sense that you see so often in popular literature and just in everyday usage which is, "Bring him to justice or we're going to get justice" in the sense of revenge. I really think Judge Cahill looked at both sides and weighed the community's interest and weighed the defendant's interest and weighed the good of the public in general in making his decisions.

And I bring him up because I think one of the most eloquent things he ever wrote was his decision in which he found in the disparity between crack and powder cocaine violated the Constitution. His opinion was scholarly. It was eloquent and empassioned almost in finding that this was a very troubling distinction and unconstitutional.

The Eighth Circuit saw otherwise. But as we indicated briefly in our objections – and I am sure that the Court knows – everybody other than congress that has

investigated that disparity subsequent has determined that it is in fact unfair and unreasonable. And it is not even supported by the public anymore. And it is that distinction that drives the length of the sentence under the guidelines, [16] and I think that the court should take that into account in crafting a sentence.

As we've indicated in the objections, if this were a powder cocaine case, Mr. Claiborne would be looking not even at a mandatory minimum; and his sentence we believe would be six to twelve months. Crack exists on a market-driven basis. It is much easier to sell small amounts of cocaine to poor people if you can make it hard so that you can break it up rather than have to measure out tiny quantities of powder. That's the reason that I believe crack exists. It is the same thing as powder cocaine.

Now, I don't want to distract us by reopening that whole debate. But I think that the existence of a controversy about that is important; and I think that the sentence being grounded under the guidelines principally on that distinction renders it suspect and I think inappropriate in Mr. Claiborne's case.

You know, Mr. Claiborne is a very young man from my perspective. He is not much older than my children. And my children aren't very old. I started late. But I see Mario, and I don't mean to diminish him in any sense by referring to him by his first name. But I've had a lot of contact with him over the course of representing him. More than many clients. I've had long talks in his office. I've been able to get him on the phone. I can tell you that he is a very [17] kind young man. I think tell you he is a very nervous young man. A very risk-averse young man.

In light of what I know about him, it is deeply distressing that he got himself involved in selling drugs. I think he realizes what a horrible mistake that was. And I use the word "mistake" with some trepidation, because I always tell clients not to use that word, because it implies something that you can erase like an arithmetic mistake with a pencil. It is not that, and he knows that.

But this is a young man who, for the most part, has been trying to do the right thing. And he's succeeded recently. He has had no bond violations while he has out on bond. He supports his children. He supports his wife. They both work. They're trying to do the right thing. His family is here in the courtroom today. They depend on him.

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As you read the letter from his mother-in-law – and I'll use that term or lack of explanation – she values him highly as well. He accepted responsibility in this case. He walked in and pled guilty and ended up pleading guilty to a superseding indictment, because we could not reach an agreement with the government. And, as a consequence, they added a charge tot indictment. So the original indictment went from one to two counts in the superseding indictment, and he accepted responsibility for all of that.

I think that, given direction and patience and [18] compassion, that this is a young man who is ultimately going to succeed in life. I think that success is important for him, and I think it is important for his children. I think it is important for the community. I am not here to ask the court to award merit badges or some of accolades to Mr. Claiborne.

One of the things my father said to me often enough that I got very tired of it as a child is that, "You don't get points for stopping at red lights." And I don't tell the court about Mr. Claiborne's success with his family or having a job as I agree that stopping at red lights you're supposed to do that. But it is the picture of the whole person that I want the court to see this morning in sentencing Mr. Claiborne.

This is not a young man who is vicious or in need of incapacitation or a danger to the community. This is a young man who has made serious errors; who has rectified those errors I believe by straightening his life out. He did it with the help of the criminal justice system, it is not the way you want somebody to come to the wisdom and understanding at least to the extent that he has it today. But there has been some success in that regard. And I would like court to continue the momentum of that success by being compassionate here this morning and sentencing him to considerably lower than what the guidelines would call for. Thank you.

[19] THE COURT: Thank you. Mr. Stevens?

MR. STEVENS: Thank you, judge. I would point out, as Mr. Dwyer did, that Judge Cahill's opinion, though well-reasoned, was reversed; and that issue has been decided over and over again. I won't belabor the point. But powder cocaine has been found repeatedly as a legal issue as not to be the same as crack cocaine. I would point out that if this were a meth case or an LSD case, there would you be a similar penalty or even higher penalty and would point out that there's plenty of research to show that both of those crimes are, in the vast majority of cases, white defendants.

I don't think that's at all an issue here. As Mr. Dwyer pointed out, Congress has repeatedly said that these are the correct penalties for this sort of crime. And it seems to me that, in the vast majority of cases, when you're interpreting a statute to sentence someone, Congress is the only one that matters. It is their opinion that is the only one that matters on this issue.

The letter from the mother-in-law indicates that Mr. Claiborne cleaned his life up three years. I am not going to quibble with dates. But the second to the two counts in this case was less than a year-and-a-half ago. It seems to me that she may simply just not know what Mr. Claiborne has been up to in the last three years. Specifically, in November of 2003 and May of 2003.

[20] Also, judge, we had issues here today regarding safety valve and the reckless endangerment during flight issue. And I would just point out that the safety valve, by requiring the defendant have no criminal history points, seems to presume that a defendant with no criminal history portion is not a recidivism risk. And as the government pointed out in its Memorandum, Mr. Claiborne did plead guilty to two separate crack crimes six months apart.

So I am not sure that the safety valve applies under its language, that this is not a somewhat different case for most safety valve cases for that reason. It is a kind of a quirk of the guidelines in a case like this essentially Mr. Claiborne gets one of those incidents for free. His penalty will not reflect that it is two separate crack cocaine incidents. And his penalty would be no different if it were one, but he's pled guilty to two.

And finally, judge, the Court found that there was no a substantial risk due to Mr. Claiborne's flight; and that if I understand the court, there was at least some risk. And I would ask that the court to take that into consideration also. Thank you, judge.

THE COURT: Thank you. Well, as I said before, the Court considers the Sentencing Guidelines in determining what's an appropriate sentence. And I think that, in light of the Court's ruling on the objections, I am still not clear [21] what the guideline range comes down to. I thought you said 37 to 46 months, but I thought it was higher. Am I missing something?

MR. DWYER: Your Honor, if he is eligible for the safety valve, he'd have a two-level reduction under 3(c)(1.1) –

THE COURT: So that's basically four point taken off.

MR. DWYER: Yes, Your Honor.

THE COURT: Four levels coming down. So that brings him down to 21 –

MR. DWYER: 21.

THE COURT: – 21? Okay. I got you now. Okay. Mr. Claiborne, in reading the Presentence Report, which is essentially all the information that I have about you, I couldn't quite figure out what is going on in your life. You are what? 21?

THE DEFENDANT: Yes, ma'am.

THE COURT: You've gotten yourself involved in selling drugs. You pled guilty to two separate counts, two

separate sales. You were arrested after the first sale, but that didn't stop you. You went ahead and sold again.

Now, why you were willing to take that risk, I don't know. And I can't figure out if you were just unlucky or if you're stupid. I hope you are not stupid, because if you [22] are, you're going to do this again. Selling drugs is not the way to support yourself. It was not the way to support your family. Because, as you stand here now, you are about to go to prison. You're not going to be able to support your family from prison.

So you need to ask yourself: Is there something else I can do to provide financial support for myself and my family that will not place me in jeopardy of being taken away from them and incarcerated for – but for your being granted these objections – a minimum of 60 months. That's a long time for someone to be sent away from their family.

Even though I've granted your objections, under the Sentencing Guidelines, you're still looking at a minimum of three years being taken away from St. Louis and from your family and from everything that you know. Now, have you given any thought to what you might do differently next time?

THE DEFENDANT: Yes, ma'am.

THE COURT: Well, I hope you give some serious thought to that, because I am very concerned that, because you're so young, you don't fully realize the effect of what you've done has on your family and what it is going to have on you and your future. And, you know, you mentioned Judge Cahill earlier. And one of the things I think I've inherited from him, aside from inheriting his docket

when his took senior status, I've gotten used to lecturing people. He was [23] really good at that. I can't come close. But it really does disturb me when I see someone of your age in a federal courtroom about to go to prison. Most 21-year-olds are not out there selling drugs, Mr. Claiborne.

What you are doing is not normal behavior, and it doesn't have to be the only thing that you do in life. I know there are a lot of things you want for yourself and for your family. But you are going to have to learn how to get those things through legitimate means, just like the majority of people do. And you may have to do without some things.

You don't have to have the latest music or the latest fashions, even though you want them, because your freedom has got to be more important to you than some fad. Okay? when you get to the point where you value your freedom more, I think that you will change your whole attitude about what you do in life.

Now I want to talk to you about Mrs. Clemens. This lady had every right to have her door open on a nice day while he was outside with her children. You had absolutely no right to run through her house. Going into someone's house in that way is a personal violation. I understand you didn't threaten anyone. And your only thought probably was, "How do I get away from the police?" But you had no business involving Mrs. Clemens and her family in your crime. That is unforgivable.

[24] I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you

did was very serious. You committed two serious felony crimes.

However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.

I don't think that that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – a much amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

As I said before, I do believe some term of imprisonment is appropriate in your case. And I hope that you don't view this as just the cost of doing business, and I hope that you never get to the point where you feel that the risk of going to prison is worth it, because it never is.

[25] Having said that, it is the judgment of the Court that the defendant, Mario Claiborne, be committed to the custody of Bureau of Prisons to be imprisoned for a term of 15 months on Count 1 and 15 months on count 2; both terms to be served concurrently.

After you are released from prison, Mr. Claiborne, you'll be placed on supervised release for three years on Count 1 and three years on Count 2. Both terms of supervision will also run concurrently.

Within 72 hours after you are released from the custody of the Bureau of Prisons, you must report in

person to the Probation Office in the district to which you are released. While you are on supervised release, you will have to compile with the standard conditions of supervision that the court has established and you have to comply with some additional conditions. The first is that you not use any corroborates unlawfully; and that you submit to a drug test within the first 15 days of your supervised release term and submit to at least two periodic drug tests after that.

You will also be required to participate in a drug abuse treatment program as directed by the Probation Office. The Probation Office may direct you to a community corrections center; a comprehensive sanctions center; or some other inpatient program or an outpatient program. You will have to pay the cost of participating in that program, and [26] the amount of your payment will be determined by the Probation Office on a sliding fee scale.

You will have the opportunity to enroll in GED classes while you are incarcerated and to obtain your GED. If I don't have your GED by the time you are released from prison, then as a further condition of supervised release, you will have to participate in GED classes as directed by the Probation Office.

As I said before, I was very disturbed by the conduct that you've engaged in in fleeing from the police and your dragging in Mrs. Clemens into all of this. So as a further condition of supervised release, I am going to require that you write a letter of apology to Mrs. Clemens and her family. That letter will be submitted to the U.S. Attorney's office, who will then forward that letter to Mrs. Clemens.

And in that letter, I hope that you will sincerely apologize for breaking into her house and for disturbing

her and her family and for frightening her and her children by your conduct.

THE DEFENDANT: Yes, I did that already. But I'll do it again.

THE COURT: If you've done it already, then I don't require you to do it again.

MR. DWYER: That apology has been expressed orally, [27] Your Honor. But we're happy to write a letter.

THE COURT: I want you to write a letter. Okay. The defendant does not have the ability to pay a fine. So none will be imposed. There is a 100-dollar assessment for each of the two counts of conviction for a total of $200. That assessment is due immediately. Was there a waiver of appeal?

MR. DWYER: No, Your Honor, there was not.

THE COURT: Mr. Claiborne, you have the right to appeal this sentence. And if you wish to appeal, you must file a Notice of Appeal within ten days from today.

THE DEFENDANT: Yes, ma'am.

THE COURT: If you don't file the notice on time, you will lose your right to appeal. You are entitled to have an attorney appointed to represent you on appeal and to file your Notice of Appeal free of charge. If you decide to handle the appeal without a lawyer, all you need to do is contact the Clerk's Office; and someone there will prepare and file the notice for you. Do you understand your appeal rights?

THE DEFENDANT: Yes, ma'am.

THE COURT: Would you me to make a recommendation to the BOP?

MR. DWYER: Your Honor, I'd just ask them to incarcerate him as close as possible to the St. Louis area.

[28] THE COURT: Okay. I'll include that recommendation in the judgment. Okay. I don't know what Judge Stohr's policy is, but I am sure you all know what my policy is, which is that detention is mandatory unless there is some circumstances that would make this an exception.

MR. DWYER: Your Honor, because both Mr. Claiborne and the mother of his children are employed full time, they work at other hours so that there is something to take care of the children, and they're very young children. So that until Thursday of last week, this was going to be handled by Judge Stohr, and they have not made arrangements alternatively for child care, since that time to cover the period between sentencing and the time he would face imprisonment. I think Judge Stohr's policy is not so automatic as yours, but I think that the child care needs; the fact that he has not had any violations while on pretrial release under the circumstances of this case would be sufficiently exceptional to adjust a voluntary surrender.

THE COURT: Okay. Mr. Stevens, what is the government's position?

MR. STEVENS: Judge, on that issue, I don't know of any exceptional circumstances. And at this time, if the Court would indulge the government, I would like to interpose an objection on the sentence of 15 months on Counts 1 and 2 as well as for purposes of the record to the

court's findings [29] and conclusions regarding the reckless endangerment enhancement.

THE COURT: All right. Thank you. Well, you know, I am not unsympathetic to child care needs. But Mr. Claiborne has known for some time that he was going to be sentenced and whether he knew that he would be remanded on the day of sentencing is really not that material. He knew that he faced a possibility of being incarcerated at some point. And so arrangements should have been made sooner for scheduling child care.

I understand that there have not been any violations of the pretrial release conditions. And that's certainly to Mr. Claiborne's credit, but I don't believe that the circumstances that you've presented to me warrant an exception from the mandatory detention provision. So, Mr. Claiborne, you will be remanded to the custody of the marshal.

Is there anything else from government?

MR. STEVENS: No, Your Honor. Thank you.

THE COURT: Mr. Dwyer?

MR. DWYER: Thank you, Your Honor.

(Whereupon, the proceedings concluded at 10:31 a.m.)

[Certification Omitted In Printing]

United States District Court
Eastern District of Missouri

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	(Filed Mar. 28, 2005)
MARIO CLAIBORNE	CASE NUMBER: 4:04CR423DJS
	USM Number: 31227-044
	Michael Dwyer
	Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) I (One) and II (Two of the Superseding Indictment on December 3, 2004

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 841(a)(1)	Distribution of Cocaine Base	May 14, 2003	I (One)
21 USC § 844	Possession of Cocaine Base	November 2, 2003	II (Two)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Counts(s) _____ dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 28, 2005
Date of Imposition of Judgment

/s/ Carol E. Jackson
Signature of Judge

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
Name & Title of Judge

March 28, 2005
Date signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 15 months.

The defendant shall be imprisoned for a term of fifteen months on count one and fifteen months on count two of the superseding indictment, each term to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

the defendant shall be assigned to a facility as close to Saint Louis, Missouri as possible to the extent that this recommendation is consistent with the policies of the United States Bureau of Prisons.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshal for this district:

☐ at _____ a.m./pm on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

MARSHALS RETURN MADE ON SEPARATE PAGE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years.

The defendant shall be on supervised release for a term of three years as to count one and for a term of three years as to count two of the superceding indictment, each term to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, as defined in 18 U.S.C. § 921. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AS WELL AS THE FOLLOWING ADDITIONAL CONDITIONS:

1. THE DEFENDANT SHALL REFRAIN FROM ANY UNLAWFUL USE OF A CONTROLLED SUBSTANCE AND SUBMIT TO A DRUG TEST WITHIN 15 DAYS OF RELEASE ON SUPERVISED RELEASE AND AT LEAST TO TWO PERIODIC DRUG TESTS THEREAFTER FOR USE OF A CONTROLLED SUBSTANCE.

2. THE DEFENDANT SHALL PARTICIPATE, AS DIRECTED BY THE PROBATION OFFICER, IN A DRUG OR ALCOHOL ABUSE TREATMENT PROGRAM

WHICH MAY INCLUDE SUBSTANCE ABUSE TESTING, COUNSELING, RESIDENCE IN A COMMUNITY CORRECTIONS CENTER, RESIDENCE IN A COMPREHENSIVE SANCTIONS CENTER, OR IN-PATIENT TREATMENT IN A TREATMENT CENTER OR HOSPITAL. THE DEFENDANT SHALL PAY FOR THE COSTS ASSOCIATED WITH SUBSTANCE ABUSE COUNSELING BASED ON A COPAYMENT SLIDING FEE SCALE APPROVED BY THE UNITED STATES PROBATION OFFICE. CO-PAYMENTS SHALL NEVER EXCEED THE COSTS OF TREATMENT.

3. THE DEFENDANT SHALL PARTICIPATE IN A GED OR HIGH SCHOOL EQUIVALENCY PROGRAM. IF THIS PROGRAM IS NOT COMPLETED WHILE IN THE CUSTODY OF THE BUREAU OF PRISONS, THEN THE DEFENDANT SHALL OBTAIN A GED BEFORE THE EXPIRATION OF THE TERM OF SUPERVISED RELEASE AND AT THE DIRECTION OF THE PROBATION OFFICER.

4. THE DEFENDANT SHALL COMPLETE A LETTER OF APOLOGY DIRECTED TO MS. CLEMONS, WHICH SHALL BE DELIVERED TO THE UNITED STATES ATTORNEY IN THIS DISTRICT TO BE FORWARDED TO MS. CLEMONS.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on sheet 6

	Assessment	Fine	Restitution
TOTALS	$ 200.00		

☐ The determination of restitution is deferred until . *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:			

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title

18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $200 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or ☐ F below; or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Payment shall be made to the Clerk of Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 4:04CR423 DJS
MARIO CLAIBORNE,	)	
Defendant.	)	

NOTICE OF APPEAL

(Filed Apr. 25, 2005)

COMES NOW, the United States of America, by and through James G. Martin, United States Attorney for the Eastern District of Missouri, and Cristian M. Stevens, Assistant United States Attorney for said District, and states that notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on March 28, 2005.

Respectfully submitted,

JAMES G. MARTIN
United States Attorney

/s/ *Cristian M. Stevens*
CRISTIAN M. STEVENS (#98871)
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111 South 10th Street, Room 20.333
St. Louis, Missouri 63102
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[Certificate Of Service Omitted In Printing]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern
	*	District of Missouri.
Mario Claiborne,	*	
	*	
Defendant-Appellee.	*	

Submitted: December 13, 2005

Filed: February 27, 2006

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.

LOKEN, Chief Judge.

Mario Claiborne pleaded guilty to two counts of possessing and distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). The district court determined that Claiborne's advisory guidelines sentencing range is 37 to 46 months in prison and imposed a 15-month sentence. The government appeals the sentence as unreasonable under 18 U.S.C. § 3553(a). We agree and remand for resentencing.

In May 2003, Claiborne was arrested for attempting to sell 0.23 grams of cocaine base to an undercover police

officer. Six months later, police approached Claiborne engaged in what appeared to be a drug deal. He fled through the house next door, throwing down a plastic baggie containing 5.03 grams of cocaine base. Claiborne was charged with and pleaded guilty to distributing cocaine base during the first incident and possessing cocaine base during the second.

At sentencing, the district court granted Claiborne "safety valve" relief from the five year mandatory minimum sentence under 18 U.S.C. § 844(a). *See* 18 U.S.C. § 3553(f); U.S.S.G. §§ 2D1.1(b)(7), 5C1.2. The court also rejected the government's position that he should receive a two-level increase for reckless endangerment because he fled through a nearby residence. *See* U.S.S.G. § 3C1.2. These rulings resulted in a guidelines sentencing range of 37 to 46 months in prison, which is not at issue on appeal. Recognizing that the guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), the district court sentenced Claiborne to 15 months in prison, concluding that "the 37 month low end of the range is, in my view, excessive" because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future. The government appeals, arguing that 15 months is an unreasonable downward variance from the guidelines range.

Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. *United States v. Haack*, 403 F.3d 997,

1002-03 (8th Cir.), *cert. denied* 126 S.Ct. 276 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of the other statutory concerns" in § 3553(a). *Booker*, 543 U.S. at 245-46. When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion.

The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. See *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). When the district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir. 2005); *see Haack*, 403 F.3d at 1004. "Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005) (citation omitted). A "range of reasonableness" is within the court's discretion. *United States v. Saenz*, 428 F.3d 1159, 1165 (8th Cir. 2005).

Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent

downward variance. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

For the foregoing reasons, we conclude that the sentence is unreasonable and remand to the district court for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.05-2198

United States of America,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern
	*	District of Missouri.
Mario Claiborne,	*	
	*	
Appellee.	*	

JUDGMENT

(Filed Feb. 27, 2006)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

February 27, 2006

ORDER ENTERED IN ACCORDANCE WITH OPINION

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America, Appellant, vs. Mario Claiborne, Appellee.	* * * * * * * *	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

Judge Gruender did not participate in the consideration or decision of this matter.

(5128-010199)

April 27, 2006

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

127 S.Ct. 551

Supreme Court of the United States
Mario CLAIBORNE, petitioner,
v.
UNITED STATES.
No. 06-5618.

Nov. 3, 2006.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to the following Questions: 1) Was the district court's choice of below-Guidelines sentence reasonable? 2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

(5)

No. 06-5618

FILED
DEC 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Was the district court's choice of below-Guidelines sentence reasonable?

In making that determination, is it consistent with *United States v. Booker,* 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

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OPINIONS BELOW

The Court of Appeals's opinion is reported at *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), and is reproduced in the joint appendix hereto at pages 88 through 91. The Court of Appeals's denial of the petition for rehearing is reproduced on page 93 of the joint appendix.

JURISDICTIONAL STATEMENT

A panel of the Court of Appeals entered its judgment on February 27, 2006. On April 27, 2006, the Court of Appeals denied the petition for rehearing and the petition for rehearing *en banc*. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a), (b)(1) & (c), 3661; and 21 U.S.C. §§ 841(a), (b)(1)(C), and 844(a), are included as an appendix to this brief.

STATEMENT OF THE CASE

I. Mario Claiborne

Now age 23, Mario Claiborne is currently living in St. Louis, Missouri, following his May 1, 2006 release from the Bureau of Prisons's custody upon completion of the 15-month sentence he received in this case. Re-sentencing proceedings, following the court of appeals's remand, have been stayed in the district court pending the outcome in this Court.

A St. Louis native, Claiborne lives with his girlfriend and their two children, and his girlfriend's older child. Joint Appendix ("JA") at 20; II-7. Their stable, five-year relationship has survived his prison sentence. They are a close-knit family, with two working parents who share child-rearing responsibility for all three children. JA at 20. Claiborne's parents separated when he was eight years old, which coincided chronologically with his failing third grade. JA at 20. From kindergarten through eighth grade, he attended six different elementary schools before dropping out of school in the ninth grade. JA at 20.

Currently employed, Claiborne has, in his own words, "always worked." JA at II-8. He was employed while on pretrial and pre-sentencing release in this case, and before that worked for his father and for a number of temporary employment agencies. JA at II-8.

His only brushes with the criminal justice system occurred as a result of the incidents for which he was convicted in this case. He has no juvenile criminal record and no other adult criminal history. JA at II-6.

II. Criminal Proceedings

On May 14, 2003, Mario Claiborne sold a single rock of cocaine, weighing 0.23 grams, to an undercover police officer. JA at 14. Arrested immediately after this offense, he was referred to the Drug Court Program in the City of St. Louis. JA at 14; II-6. About six months later, on November 3, 2003, he was arrested again, this time for possession of crack. He was standing on the front porch of a residence when police approached. JA at 14-15. He tossed a bag containing 5.03 grams of crack in the officers' presence and fled into the residence. *Id.* Exiting the rear, he fled from police on foot. During the pursuit, he saw an open door of a house belonging to a woman he knew from the neighborhood, entered her house without invitation, and immediately exited the rear. JA at 47, 60. Claiborne was unarmed, touched no one, and neither used nor threatened violence to anyone. JA at 56-57, 60-62. He was in the residence only long enough to run in the open front door and out the rear door. *Id.* The Drug Court Program terminated Claiborne the following day. JA at II-6.

Approximately 10 months after this arrest, a federal grand jury returned a one-count indictment against Claiborne charging him with possessing the 5.03 grams of crack on November 3, 2003, with intent to distribute. JA at 1, 5-6. He was released on bond on September 8, 2004. JA at 1; II-1. A month later, after the parties were unable to work out a plea agreement, the government obtained a superseding indictment, which charged the May 14, 2003 incident in Count One and the November 3, 2003 incident in Count Two. JA at 1, 7-9, 66.

Claiborne pled guilty to both counts, without a plea agreement. The parties stipulated to the applicable statutory

penalties. JA at 11. For Count One, distribution of a controlled substance, 21 U.S.C. § 841(b)(1)(C) sets a range of punishment from zero to 20 years imprisonment. For Count Two, possession of a controlled substance, 21 U.S.C. § 844(a) required a mandatory five-year minimum sentence and set a maximum sentence of 20 years imprisonment. The three-hundredths of a gram by which the weight of the crack cocaine recovered on November 3, 2003, exceeded 5 grams, triggered the five-year mandatory minimum sentence. *See id.* Had the bag weighed five grams or less, the statutory maximum would have been one year. *See id.*

At sentencing, the district judge, over the government's opposition, ruled that Claiborne qualified for the safety-valve exemption, U.S.S.G. §5C1.2; §2D1.1(b)(7), from Count Two's mandatory minimum sentence. JA at 60-62. The district judge ruled that Claiborne (1) had no criminal history points; (2) had not used or threatened violence or possessed a weapon; (3) did not cause any injury; (4) did not supervise, manage, lead, or organize other criminal actors; and (5) offered the government all information he had concerning the offense. *See id.*; U.S.S.G. §5C1.2. In addition, the district judge rejected the government's request for a sentence enhancement under U.S.S.G. §3C1.2 for reckless endangerment during flight. JA at 62. The judge concluded that Claiborne's offense level, reduced by five points for the safety valve and acceptance of responsibility was 21, which, with zero criminal history points, resulted in a Sentencing Guideline range of 37 to 46 months. JA at 69.

Defense counsel urged the district court to impose a sentence more lenient than the Guidelines called for, noting, among other things, the disparate treatment of

cocaine base compared to cocaine powder. JA at 63-67. Counsel stressed the unreasonableness of the 100:1 drug quantity ratio between powder and crack cocaine employed by the advisory Sentencing Guidelines and pointed to the conclusions of the United States Sentencing Commission that this disparate treatment "cannot be justified." JA at 22; 63-65. Had Claiborne been charged with a total of 5.26 grams of cocaine powder rather than crack cocaine, counsel noted, the Guideline range would have been 6 to 12 months. JA at 65. Counsel also pointed out Claiborne's success supporting his family while on bond and urged the court "to continue the momentum of that success" by sentencing him "considerably lower than what the guidelines would call for." JA at 65-67. The district court agreed that the Guideline range was excessive, JA at 71, and offered a detailed explanation for this conclusion:

> I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.
>
> However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.
>
> I don't think that's appropriate in your situation. And when I compare your situation to that

> of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – much [larger] amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

JA at 71-72. The district court imposed concurrent 15-month sentences to be followed by a three-year supervised release term with drug testing and counseling. JA at 71.

The government appealed, arguing only that the district court's variance from the Guidelines range was unreasonable. JA at 88. A panel of the Eighth Circuit agreed. It held that because "the Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," the range recommended by the Guidelines "is presumed reasonable." JA at 90. Sentences varying from that range, the court continued, "'are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a).'" JA at 90. It further noted that "'[h]ow compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" JA at 90.

The court of appeals labeled Claiborne's sentence an "extraordinary variance" because the 15 months that Claiborne received is 60 percent lower than the 37-month low end of the range. JA at 90-91. It held that this variance was not supported by the requisite "extraordinary facts." JA at 91. The court of appeals ignored the district court's concern that a 37-month sentence would be tantamount to "throwing [Claiborne] away." JA at 90-91. Rather, it determined that the circumstances of the offenses, particularly their being committed within a few

months of one another, demonstrated that Claiborne "has not earned an extraordinary downward variance from a guidelines sentence." JA at 91. It held that the relatively small amount of drugs involved in the transactions could be considered only in calculating the Guidelines range, and intimated that further consideration would constitute double counting. JA at 91. Astonishingly, the court then rendered its own factual findings in support of a lengthier sentence, finding that "it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between" the two crimes. JA at 91. Despite the lack of any evidence in the record for this proposition, the court of appeals relied on it to hold that Claiborne's sentence was unreasonable. JA at 91.

SUMMARY OF ARGUMENT

In sentencing Mario Claiborne, the district court complied in all respects with the sentencing process required by *United States v. Booker*, 543 U.S. 220 (2005), to cure the Sixth Amendment violation caused by the mandatory Sentencing Guidelines. The judge's inquiries and explanations confirm that she considered all factors listed in 18 U.S.C. § 3553(a) to choose a sentence "sufficient but not greater than necessary" to accommodate them, as *Booker* envisioned. The judge assessed the nature of the case, noting the small drug quantity involved, and confirmed the lack of violence, weapons, or physical force. She reviewed Claiborne's background, including his lack of juvenile or other criminal record, plus his full-time employment and parenting throughout his pre-trial release. The judge gauged his likelihood of re-offending to be low. By calculating and considering an advisory Guidelines

range of 37-to-46 months, the judge satisfied section 3553(a)(4). In addition, she considered the need to avoid unwarranted disparities as section 3553(a)(6) directs, comparing Claiborne's case to others she had seen. Ultimately, she concluded that imposing a Guidelines term would be tantamount to throwing away Claiborne's rehabilitative prospects. She chose a 15-month prison term as sufficient but not greater than necessary to accomplish the statutory sentencing purposes. The judge added three years of supervised release with conditions of drug treatment and completion of his G.E.D., thus addressing the needs of protecting the public from future crimes and providing deterrence, correction, and education in the most effective manner. 18 U.S.C. § 3553(a)(2)(B - D).

Post-*Booker* reasonableness review grants substantial deference to the district court's exercise of informed discretion. The examples the Court cited to illustrate this standard all evidence a highly deferential appellate posture concerning the district court's decision whether to follow or vary from advisory Guidelines. The effectiveness of the *Booker* remedy depends on the district court's exercise of reasoned discretion, and deference to the district court's choice.

The court of appeals instead substituted its judgment that the Guidelines set a presumptively reasonable range incorporating all section 3553(a) factors, from which no extraordinary circumstances justified a 60 percent variance. JA at 91. In fact, the Guidelines did not incorporate the other relevant section 3553(a) factors, but, rather, prohibited and discouraged consideration of the individual circumstances upon which the district court relied. Rather than defer to the district court's superior vantage point to gauge those considerations, the Eighth Circuit did not

mention the district court's reliance on her experience sentencing other defendants and her assessment of Claiborne's capacity to recover from a longer sentence. In fact, the Eighth Circuit applied its own finding that Claiborne probably engaged in additional crimes, of which neither proof nor allegation existed.

The Eighth Circuit's approach rests on the false premise that this Court intended "reasonableness" review to limit the range of choice available to judges considering section 3553(a). Requiring "extraordinary justification" for non-Guidelines sentences negates the expanded district court discretion the *Booker* remedy required to render the prior presumptive Guidelines system "effectively advisory." This approach subjugates a district court's discretion evaluating section 3553(a) factors to the Guidelines grid, much as section 3553(b) did before *Booker*. Nothing in *Booker* or section 3553(a) supports a preeminent position for the Guidelines. Employing a simplistic, arithmetic measure of a district court's decision to vary from the Guidelines, the court of appeals ignored the focus on section 3553(a) that *Booker* requires. This approach elevates the bare assertion by a court of appeals that "the Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," JA at 90, above the superior vantage point and experience of a district judge who met and assessed the individual in question and hundreds of others besides. It negates the significance of section 3553(a) factors the appellate courts have little basis to evaluate, while reinstating the preeminence of the Guidelines grid. The Eighth Circuit's decision, therefore, must be reversed.

ARGUMENT

I. The district court's choice of a below-Guidelines sentence was reasonable.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory Federal Sentencing Guidelines violated defendants' Sixth Amendment right to a jury because they required judges, rather than juries, to find the facts used to enhance sentences. *See* 543 U.S. at 245. To cure this constitutional defect, the Court excised 18 U.S.C. § 3553(b)(1), the provision that required district courts to impose sentences within the applicable Guideline range absent a circumstance of a kind or degree not taken into consideration by the Commission in formulating guidelines. *See* 543 U.S. at 259. In rendering the Guidelines thus advisory, the Court directed district courts to sentence defendants pursuant to the sentencing purposes and factors in 18 U.S.C. § 3553(a). *See* 543 U.S. at 245-46. "So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 543 U.S. at 245-46; *see also id.* at 259-60.

Section 3553(a) opens with the command that district courts "shall impose a sentence sufficient, but not greater than necessary, to comply with the [four] purposes in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). As *Booker* summarized, the four purposes in section 3553(a)(2) "require[] judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence,

protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 260. The statute's second command is that district courts consider all of the factors enumerated in 3553(a)(1) through 3553(a)(7). *See* 18 U.S.C. § 3553(a). Apart from its opening command to impose a sentence sufficient but not greater than necessary, the statute's language suggests nothing to indicate that any single factor or purpose should predominate or control the district court's exercise of sentencing discretion and judgment. *See id.*

After *Booker*, the first question in assessing the lawfulness of the sentence in a particular case is whether the district court complied with its duties under section 3553(a). Compliance does not turn on an assessment whether the district court believed its sentence to be "reasonable." Congress did not write the word "reasonable" or the word "reasonableness" into section 3553(a) and *Booker* did not add words to the statute. A district court fulfills its post-*Booker* sentencing duties by considering each factor in section 3553(a) and offering a reasoned elaboration of its judgment sufficient for the court of appeals to apply the post-*Booker* standard of appellate review "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)." 543 U.S. at 261.

Examination of the record in Claiborne's case reveals that the district court met this standard. It considered the relevant factors directed by section 3553(a) and imposed a sentence that, in its view, was "sufficient but not greater than necessary" to satisfy the statutory purposes of sentencing.

A. The district court followed this Court's remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005), by considering the sentencing factors in 18 U.S.C. § 3553(a), and choosing, in compliance with section 3553(a)'s command, a sentence sufficient but not greater than necessary to comply with section 3553(a)(2)'s sentencing purposes.

1. The district court considered section 3553(a)'s sentencing factors.

Resolving Sentencing Guidelines issues at the outset of Claiborne's sentencing hearing, the district judge demonstrated that she understood the nature of the crimes to which he pled guilty and their circumstances. *See* JA at 56-57, 60-62; 18 U.S.C. § 3553(a)(1) (nature and circumstances of the offense); § 3553(a)(4) (Sentencing Guidelines). In particular, she noted the "quantity of drugs that are involved." *See* JA at 72. And, the amounts are relatively small. The May 14, 2003 sale involved a single rock of crack cocaine weighing only 0.23 grams. JA at 14. The 5.03 grams of crack involved in the November 3, 2003 possession, is a bare three-hundredths of a gram above an amount that would have permitted a maximum sentence of only one year. *See* JA at 14; 21 U.S.C. § 844(a).

The Presentence Investigation Report told the district court that Claiborne had no criminal history, JA at II-6, a fact the district judge recognized by finding that he qualified for the safety valve and incorporated into the reasons for her sentence. JA at 61-62, 71. Although the Presentence Investigation Report contained little information about Claiborne's educational history, JA at II-8, the district judge knew from Claiborne's pleadings that he had attended six different elementary schools and dropped out

of school in the ninth grade. JA at 20. Accordingly, the district court, in admonishing Claiborne to meet his responsibilities legitimately, also challenged him to improve himself by requiring him to obtain a GED. *See* JA at 70-73; 18 U.S.C. § 3553(a)(1) (history and characteristics of the defendant). In addition, she ordered him to continue the drug counseling that had been a condition of his bond when he completed his prison sentence and began the three-year supervised release term. *See* JA at 73, II-8.

The record abundantly corroborates the district judge's explicit assertion that she had considered the Sentencing Guidelines. JA at 62. "I think the guidelines are certainly instructive and will provide some guidance to the Court in determining what's an appropriate sentence in this case." *Id.* In addition, she addressed section 3553(a)(6)'s directive to avoid unwarranted sentencing disparities, specifically mentioning this concern as part of her balance of factors leading to Claiborne's sentence. JA at 72.

The district judge's findings concerning the absence of violence and weapons reflected her belief that Claiborne's case evidenced none of the behaviors that some have argued as justification for the penalty differentials between crack and powder cocaine. *See* JA at 21, 60-63, 72. *See* United States Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* at vii (May 2002) ("2002 Report"). She understood that he was a small-scale street dealer. *See id* at 45. Typical of this very ordinary drug offense, there was no victim who suffered financial loss, JA at II-10, but the court ordered Claiborne to write a letter of apology to the owner of the house through which he ran on November 3, 2003. *See* JA at 73;

18 U.S.C. § 3553(a)(7) (the need to provide restitution to victims).

Addressing Claiborne directly, the district judge noted the importance of his family and his responsibilities to them. *See* JA at 70; 18 U.S.C. § 3553(a)(1) (defendant's history and characteristics). From the Presentence Investigation Report, she knew that he had "always worked," and had full time employment at the time of sentencing, a job he had obtained promptly after being released on bond. JA at II-8. She focused on his desire to support his family, knowing from both the Presentence Investigation Report and Claiborne's pleadings that he and his girlfriend lived together with their two children and his girlfriend's older child, whom Claiborne also supported. JA at 20, II-7. In this context, she stressed her belief that the imprisonment she believed it was necessary to impose sufficed to convince him of the need for a crime-free future. JA at 70-71.

2. The record at Claiborne's sentencing establishes that the district court understood section 3553(a)'s command to exercise judgment and to impose a sentence sufficient but not greater than necessary to advance section 3553(a)'s sentencing purposes.

Section 3553(a) opens with an unambiguous command for sentencing courts to exercise judgment. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). By making section 3553(a) the touchstone for sentencing, *Booker* freed district courts from section 3553(b)'s constraint to impose guidelines-dictated sentences, under

which necessary factual findings require specific sentence increases. *See* 543 U.S. at 245. Thus, *Booker* transformed sentencing from an arithmetic exercise – involving judicial fact-finding with mandatory consequences – to an exercise of judgment. *See Booker,* 543 U.S. at 261-62; *United States v. Crosby,* 397 F.3d 103, 111-13 (2d Cir. 2005). The sentencing process that *Booker* requires is hardly as unconstrained or as open-ended as the discretion that existed before the Sentencing Reform Act, which permitted discretion to the statutory maximum and that was essentially unreviewable on appeal. *See United States v. Jaber,* 362 F. Supp.2d 365, 370-71 (D. Mass. 2005); *see also* Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible,* 4 Ohio St. J. of Crim. L. 37, 46-47 (2006). *Booker* imposed specific limits on district courts' sentencing discretion by requiring sentences that address and consider section 3553(a)'s purposes and factors, including the Sentencing Guidelines. *See* 543 U.S. at 245-46. Nevertheless, in post-*Booker* sentencing, the district court's ultimate, overarching duty, to balance sufficiency and necessity, demands judgment.

The record amply demonstrates that Claiborne's 15-month sentence was the product of informed and reasoned judgment. The district judge emphasized to Claiborne that she considered his crimes serious. JA at 69-70, 73. Yet, she knew that a mere three-hundredths of a gram of crack raised his statutory maximum from one year to 20 years. *See* 21 U.S.C. § 844(a). She knew that if his case involved powder cocaine rather than crack cocaine, his guideline range would have been six to 12 months. JA at 65; *see* U.S.S.G. §2D1.1. The judge was also informed that the 5.26 grams of crack Claiborne possessed was one-tenth the median amount attributed to street-level crack dealers. JA

at 19-20 (citing 2002 Report at 45). "[W]hen I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involve a larger – much [larger] amount of drugs – and the sentences they receive I don't believe that 37 months is commensurate in any way with that." JA at 72. Thus, she reflected on the seriousness of the offense and the need to avoid unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(2)(A); § 3553(a)(6).

In this vein also, she voiced her concern to specifically deter Claiborne from further criminal conduct. JA at 69-70. But, she recognized Claiborne's youth: "[I]t really does disturb me when I see someone of your age in a federal courtroom about to go to prison." JA at 71. And, prompted by the same concern that led her to require him to obtain his GED and to participate in a drug program on supervised release, she sought to maximize his potential to recover from imprisonment and return to the family responsibilities that were so evidently important to him. "[W]hen I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away." JA at 72. These comments reflect the district court's judgment that just punishment and the need to protect the public from future crimes meant, in Claiborne's case, a sentence that punished without severing his family connections. She did not wish to throw away his chance to be a father, to reintegrate with his family, and to resume his family responsibilities. To that end, she tailored his sentence in light of the purposes of sentencing

in section 3553(a)(2) to ensure that he was punished sufficiently but not greater than necessary.

B. The district court's reasoned elaboration of its findings, conclusions, and judgment was reasonable under the substantial deference owed her rulings on appeal.

After Booker, the question presented when a party appeals a sentence is whether the district court's discretionary judgment embodied a reasonable application of section 3553(a) purposes and factors. *Booker*, 543 U.S. at 261. The government appealed Claiborne's sentence solely because it did not fall within the Guidelines range, but *Booker* reasonableness review is not defined by Guidelines compliance. *Id.* at 260-61. *Booker* excised section 3742(e) (main volume & 2004 ed.) specifically because it was designed to enforce the Guidelines and, therefore, was "inconsistent with the Court's constitutional requirement." *Id.* at 258. In Claiborne's case, the district court's choice of a below-Guidelines sentence was reasonable.

1. Under the deferential standard of review established in *Booker*, the district court's 15-month sentence of imprisonment was reasonable in light of section 3553(a)'s factors and the district court's stated reasons.

Booker established a practical standard of review applicable to all criminal sentences, within or without the Guidelines' advisory range. 543 U.S. at 263 (reasonableness review applies to sentences "across the board"). Appellate courts now review a district court's judgment to determine whether a sentence

> *is unreasonable*, having regard for . . . the factors to be considered in imposing a sentence, as set forth in Chapter 227 of this title; and . . . the reasons for the imposition of a particular sentence as stated by the district court pursuant to the provisions of section 3553(c).

Id. at 261 (citing 18 U.S.C. § 3742(e)(3) (1994 ed.)) (emphasis added in *Booker*).

The Court modeled this reasonableness review on the standards employed before 2003 to review (1) sentences imposed pursuant to Guidelines departures, and (2) sentences for which no mandatory Guidelines range existed, such as those imposed following revocation of supervised release. *Id.* at 261-62. The Court cited a list of cases illustrating this standard. *Id.* at 262. These cases emphasize the deferential nature of reasonableness review that *Booker* adopted. In each of the illustrative cases, the court of appeals took a "deferential appellate posture concerning issues of fact and the exercise of discretion," and upheld sentences far outside the advisory Guidelines range. *United States v. Salinas*, 365 F.3d 582, 588 (7th Cir. 2004); *see also United States v. White Face,* 383 F.3d 733, 740 (8th Cir. 2004) (affirming revocation sentences two and three times higher than the maximum guidelines sentence); *United States v. Cook,* 291 F.3d 1297, 1302 (11th Cir. 2002) (no abuse of discretion in sentence more than twice guidelines maximum in light of court's concern for rehabilitation and treatment); *United States v. Ramirez-Rivera,* 241 F.3d 37, 40 (1st Cir. 2001) (affirming 24-month sentence imposed although advisory guideline range was three to nine months). In all of these cases, the advisory range "informs rather than cabins the exercise of the district court's discretion." *Salinas*, 365 F.3d at 588. This

deferential review respects the district court's unique position at sentencing:

> Review of the reasonableness of the district court's departure from the Guidelines involves what is quintessentially a judgment call. District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior "feel" for the case. We will not lightly disturb decisions to depart, or not, or related decisions implicating degrees of departure.

United States v. Diaz-Villafane, 874 F.2d 43, 49-50 (1st Cir. 1989) (upholding upward departure from Guidelines range); *see also United States v. Passmore,* 984 F.3d 933, 937-38 (8th Cir. 1993) (same).

In all respects with regard to § 3553(a), the district court's sentence in Claiborne's case was reasonable. Applying the standard of review *Booker* established easily supports the reasonableness of the district court's judgment, as the decision in *United States v. Jones*, 460 F.3d 191 (2nd Cir. 2006) (Newman, J.), proves. The Second Circuit does not presume the Guidelines range reasonable in its appellate review. *See id.* at 195-96; *United States v. Crosby*, 397 F.3d 103, 110-15 (2nd Cir. 2005). Instead, the Second Circuit analyzes sentences in light of the section 3553(a) factors and the district court's stated reasons, as *Booker* taught. *See id.*

In *Jones*, the Second Circuit affirmed a non-Guidelines, 15-month sentence for drug related charges. *See* 460 F.3d at 193-94. The district court justified Jones's

sentence with reasons remarkably like those given by the judge who sentenced Claiborne. *See id.* Police officers arrested Jones in possession of five bags of marijuana and three guns. *See id.* at 193. He pled guilty to being a felon-in-possession of firearms, a violation of 18 U.S.C. § 922(g), and to possessing a detectable amount of marijuana, a violation of 18 U.S.C. § 844(a), pursuant to a plea agreement stipulating a Guidelines range of 30 to 37 months. *See id.* at 193-94. Citing Jones's "work ethic" in supporting his wife and other family members, the recent death of Jones's father, Jones's attempt at college, and Jones's completion of probation for a prior offense, the district court imposed a 15-month sentence. *See id.* at 194. The judge acknowledged that he could not explain his reasoning entirely, but he had a "gut" feeling about Jones: "I still have the sense that Eric Jones is capable of doing much better." *Id.* at 194.

The district courts in both *Jones* and *Claiborne* deemed 15 months in prison sufficient punishment while boosting the odds for the defendants' successful reintegration into society. The Second Circuit easily affirmed Jones's 15-month sentence, citing the judge's discretion and expertise in determining how best to both punish and rehabilitate. *Id.* at 195. The Court noted that reasonableness is "inherently a concept of flexible meaning, generally lacking precise boundaries." *Id.*; *see also United States v. Fairclough*, 439 F.3d 76, 79 (2nd Cir. 2006). Circumstances warranting rejection of a district court's judgment as unreasonable would arise "infrequently," the Second Circuit noted, adding that Jones's 15-month sentence for the gun and drug charges was reasonable. *Id.*

The Second Circuit's standard of review correctly comprehends and applies *Booker* and fulfills the duties of

the courts of appeal in the post-*Booker* era. After *Booker,* appellate review exists to ensure the application of section 3553(a)'s factors and purposes in each case:

> The circuit courts enforce and enhance post-*Booker* requirements by evaluating the reasons offered in support of district courts' sentencing choices. Justice Breyer's opinion in *Booker* recast appellate review around the concept of "reasonableness" and explained that the provisions of § 3553(a) should "guide appellate courts . . . in determining whether a sentence is unreasonable. After *Booker,* circuit courts must ensure the exercise of reasoned judgment by district judges at sentencing; any sentencing decision that fails to thoroughly and thoughtfully address the congressional directives of § 3553(a) must be considered suspect.

Douglas A. Berman, *Reasoning Through Reasonableness,* 115 Yale L.J. Pocket Part 142, 143 (2006) (accessible at http://www.thepocketpart.org/2006/07/berman.html).

Measured by this standard of appellate review, it is apparent that the district court's choice of below-Guidelines sentence for Claiborne is reasonable. The district court reviewed information addressing all of the section 3553(a) purposes and factors, including the advisory Guidelines (which the government did not challenge on appeal). *See* JA at 55-72. The record establishes a reasoned and measured consideration of both offense and offender characteristics as section 3553(a) directs. *See id.* The district judge tailored Claiborne's sentence with an eye toward the severity of the offense, the deterrence of future crimes, and provision of correctional treatment in the most effective manner. *See* JA at 71-72. Her review evaluated Claiborne as an individual and as a person who

must return to society. Thus, she balanced sufficiency and necessity and arrived at a 15-month sentence that ensured that Claiborne was being punished without being "thrown away." *See* JA at 7. Her sentence is reasonable.

2. The court of appeals's rejection of Claiborne's 15-month sentence was premised on an erroneous understanding of *Booker* and the role of the Sentencing Guidelines.

Unlike the district court's focus on section 3553(a)'s purposes and factors, the court of appeals focused only on the Sentencing Guidelines. *See* JA at 90-91. It began from a premise that the Guidelines range took all other section 3553(a) factors into account and was, therefore, presumptively reasonable. *See* JA at 90. Relying only on a simplistic arithmetic calculation that the 15 months Claiborne received is only forty percent of the 37-month low end of the applicable guideline range, the Eighth Circuit labeled this difference an extraordinary variance. *See* JA at 90-91. It ignored section 3553(a)'s command to balance sufficiency and necessity altogether and failed even to mention the district court's judgment that 37 months would effectively extinguish Claiborne's chances of successful reintegration into his family and the community. *See id.* Further, the Eighth Circuit ruled that the district court unreasonably failed to attribute greater culpability to Claiborne based on phantom crimes for which no evidence or accusation appeared. *See* JA at 91. In sum, the court of appeals misapplied the standard of review articulated in *Booker.*

a. The Guidelines do not take the section 3553(a)'s factors and purposes into account.

Contrary to *Booker*'s admonition to anchor its review on section 3553(a) and the district court's stated reasons, the Eighth Circuit focused on just one aspect of section 3553(a), the Sentencing Guidelines. *See* JA at 90-91. It began its analysis by asserting, without citation to any authority, that the "Guidelines were fashioned taking the other § 3553(a) factors into account." *See* JA at 90. This assertion is, however, demonstrably incorrect. Rather than taking 3553(a) factors into account, the Guidelines prohibit, discourage, or restrict use of most offender characteristics even as a basis for departure. The Guidelines prohibit consideration of drug or alcohol dependence, gambling addiction, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, personal financial difficulties or economic pressures on a trade or business, diminished capa[illegible]he offense involved a threat of violence or was [illegible] voluntary use of drugs or other intoxicar[illegible] sentencing rehabilitation, or single aberrant acts [illegible]he defendant has any significant prior criminal behavior even if it is too remote or inconsequential to appear in that defendant's criminal history score. *See* U.S.S.G. §5H1.4; §5H1.12; §5K2.12; §5K2.13; §5K2.19; §5K2.20. The Guidelines strongly discourage consideration of age, education and vocational skills, mental and emotional conditions, physical conditions or appearance, employment record, family ties and responsibilities, military service, charitable work, public service, or good works. *See* U.S.S.G. §5H1.1; §5H1.2; §5H1.4; §5H1.5; §5H1.6; §5H1.11. All of these factors are now directly relevant to section 3553(a)'s

command that district courts consider a defendant's history and characteristics. *See* 18 U.S.C. § 3553(a)(1).

History also refutes the Eighth Circuit's assertion that the Guidelines take the section 3553(a) factors into account. The Sentencing Commission has repeatedly acknowledged the impossibility of drafting a single set of guidelines that accounts for all potentially relevant sentencing factors. *See* U.S.S.G., Ch. 1, Pt. A.4(b); United States Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003). When the original Commissioners failed to agree about the inclusion of mitigating factors such as age, employment history and family ties, they were excluded, although this rejection was not intended as the final word. *See* Stephen Breyer, *The United States Sentencing Guidelines and the Key Compromises on Which They Rest,* 17 Hofstra L. Rev. 1, 19-20 (1988); Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited,* 11 Fed. Sent. R. 180, 1999 WL 730985 at *5 (Jan./Feb. 1999). Yet, despite research by the Sentencing Commission demonstrating that a number of factors predict a reduced risk of recidivism (age, marriage, employment, and first offender status), the Sentencing Commission has failed to add mitigating offender characteristics to the Guidelines. *See* United States Sentencing Commission, *Measuring Recidivism, The Criminal History Computation of the Federal Sentencing Guidelines* 12, 13 (May 2004); United States Sentencing Commission, *Recidivism and the First Offender* 7, 8 and Exhibit 2 (May 2004). These offender characteristics relate directly to section 3553(a)'s sentencing factors and purposes, but the Guidelines do not reflect them.

The Guidelines are not the touchstone of reasonableness and section 3553(a) permits no such special status in any of the section 3553(a) factors. In resorting to its unfounded assertion that the Guidelines account for the 3553(a) factors and presuming the Guidelines reasonable, the court of appeals in Claiborne's case chose a blunt, numeric categorization over the careful judgment and record creation the district court undertook in her sentencing of Claiborne. JA at 70-71, 90-91. It thus misapprehended both the nature of the Guidelines and its obligations under *Booker*. This error, however, permitted the court of appeals to ignore *Booker*'s direction to measure reasonableness against the whole of section 3553(a). *See* 543 U.S. at 261.

b. A presumption that the Guidelines are reasonable is inconsistent with both section 3553(a) and *Booker*.

A sentencing scheme in which the Guidelines are termed advisory but presumed reasonable is essentially identical to the sentencing system that existed before *Booker*. Before *Booker*, 18 U.S.C. § 3553(b) required district courts to impose sentences based on judicial factfinding leading to required increases in sentences unless they found grounds to depart. Thus, the Guideline range was the presumptive sentence unless a defendant qualified for a departure. *See United States v. Granderson*, 511 U.S. 39, 49 n.7 (1994) (departures from presumptive Guidelines range to statutory maximum requires extraordinary justification). *Booker* held that such a system violated Sixth Amendment rights, a defect it remedied with advisory, not presumptive, guidelines. It rendered the Guidelines advisory by excising section 3553(b) and its

requirement that district courts impose guideline sentences absent grounds for departure. *See* 543 U.S. at 259.

The Eighth Circuit's adoption and cultivation of a presumption of reasonableness artificially elevates a single factor in section 3553(a), subsection (a)(4), above all others. Neither *Booker* nor section 3553(a) grant the Guidelines such priority. *See, e.g., Booker*, 543 U.S. at 300 (Stevens, J., dissenting in part) ("the sentencing range contained in the Guidelines . . . is now nothing more than a suggestion that may or may not be persuasive to the judge when weighed against the numerous other considerations listed" in section 3553(a)); 543 U.S. at 304-05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors"); *United States v. Jimenez-Beltre*, 440 F.3d 514, 526 (1st Cir. 2006) (Lipez, J., dissenting) ("As a matter of statutory construction, there is nothing in the language of Section 3553(a) that justifies attributing to the guidelines 'substantial weight' in the sentencing decision."). By presuming the guidelines reasonable and reordering section 3553(a)'s language, the court of appeals demotes the purposes of sentencing in subsection (2) that Congress required sentencing courts to balance in imposing sentences sufficient but not greater than necessary to achieve these purposes. Thus, the court of appeals's presumption rewrites section 3553(a) and subordinates the judgment needed to individualize sentences through the balance of sufficiency and necessity. The presumption subordinates the balancing of section 3553(a)(2)'s purposes of sentencing to the rigid arithmetic of the Guidelines.

The coercive effect of the Eighth Circuit's presumption of Guidelines reasonableness can be seen in the presumption's evolution. Use of the presumption began as dicta in

a footnote discussing the review of within-Guidelines-range sentences. In *United States v. Marcussen,* 403 F.3d 982 (8th Cir. 2005), the court affirmed a Guidelines-range sentence in view of the section 3553(a) factors implicated by the district court's reasons. *See id.* at 985. A footnote to the court's conclusion needlessly recommended that an appellate court "ordinarily" begin with its own guidelines calculation

> to glean some reliable idea about what constitutes a proper starting point – and in many cases a resting point – toward a reasonable sentence for the particular offense of conviction and the particular defendant and to achieve one of the primary goals of the Sentencing Reform Act of 1984 to reduce disparity in the sentences imposed on similarly situated defendants. See 18 U.S.C. 3553(a)(6) (2000).

Id. at 985 n.4. Three months later in *United States v. Lincoln,* 413 F.3d 716 (8th Cir. 2005), the Eighth Circuit cited this footnote from *Marcussen* and declared that because the defendant's sentence fell within the Guidelines range, "we think that it is presumptively reasonable." *Id.* at 717. The court offered no reason for adopting this presumption in a case in which the district court had "methodically" stated the reasons for the sentence under each factor in section 3553(a). *Id.* at 717-18. For the next six months, the Eighth Circuit cited the presumption in reviewing Guidelines-range sentences, typically as general corroboration of reasonableness more directly established by the district court's stated reasons. *See, e.g., United States v. Mickelson,* 433 F.3d 1050, 1056 (8th Cir. 2006); *United States v. Tobacco,* 428 F.3d 1148, 1151 (8th Cir. 2005); *United States v. Crume,* 422 F.3d 728, 732 (8th Cir. 2005).

The presumption's force sharply expanded in *United States v. McMannus,* 436 F.3d 871 (8th Cir. 2006), in which the court of appeals reversed a below-Guidelines sentence. The Eighth Circuit released district courts from any duty to provide "robotic incantations" of section 3553(a) factors, but then it announced a rule that "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *Id.* at 874. The court cited 18 U.S.C. § 3553(c)(2), which requires that the district court "shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is outside the [guidelines] range . . . specific reasons for the imposition of the sentence different from that described." *Id.* In fact, section 3553(c)(2)'s plain language requires an explanation for all sentences. Nothing in the statute suggests that the district court must provide increasingly greater justification according to the degree to which the sentence varies from the Guidelines range. Nevertheless, the Eighth Circuit started citing the presumption of Guidelines reasonableness to demand that "[a]s the size of the [Guidelines] variance grows, so too must the reasons that warrant it." *United States v. Medearis,* 451 F.3d 918, 920 (8th Cir. 2006); *see also United States v. Larrabee,* 436 F.3d 890, 892 (8th Cir. 2006). Within a year of adopting this presumption the Eighth Circuit began referring to the Guidelines as something more than advisory. The Guidelines "continue to be guideposts that must be respected, lest we see a return to the unwarranted sentencing disparities that resulted in the adoption of the Guidelines themselves." *United States v. Likens,* 464 F.3d 823, 826 (8th Cir. 2006) (reversing a below-Guidelines sentence); *see also United States v. Ture,* 450 F.3d 352, 358 (8th Cir.

2006) (same); *United States v. Bryant*, 446 F.3d 1317, 1320 (8th Cir. 2006) (same).

The coercive effect of the Eighth Circuit's approach has effectively resulted in a system that declares unreasonable almost all sentences below the guidelines range. In the first 20 months after this Court decided *Booker*, the Eighth Circuit reversed 25 sentences imposed below the Guidelines range and upheld four below-Guidelines judgments. *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (listing cases); *United States v. McDonald*, 461 F.3d 948, 960 (8th Cir. 2006) (Bye, J., dissenting) (supplementing the list in *Meyer*). Within that same period, the court reversed only one sentence imposed within the Guidelines range. *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). During this same period, the court of appeals upheld 16 sentences that exceeded the Guidelines range, *United States v. Meyer*, 452 F.3d at 1000 n.3; *United States v. McDonald*, 461 F.3d at 960; and reversed one, *see United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006). The Eighth Circuit has suggested these figures overstate the seemingly disparate treatment in light of the greater number of below-guidelines sentences the government has not appealed in the Eighth Circuit. *See United States v. McDonald*, 461 F.3d at 956 n.7. However, the Eighth Circuit cases upholding above-guidelines sentences do not mention a presumption of reasonableness in the guidelines calculation, even when the sole basis for the departure concerns the defendant's criminal history. *See United States v. Maurstad*, 454 F.3d 787, 789-90 (8th Cir. 2006).

Thus the evolution of the Eighth Circuit's presumption of reasonableness demonstrates that it is irreconcilable with the post-*Booker* requirement of appellate review

of discretionary sentencing based on all the section 3553(a) considerations, the Guidelines being just one. *Booker*, 543 U.S. at 260-61. This Court struck a judicial presumption in parallel circumstances in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994). The Court ruled that a presumption against fair use founded solely on the commercial nature of a parody could not be reconciled with section 107 of the Copyright Act, because the statute listed four factors courts were to "consider" in determining whether an artistic work is fair use. *Id.* at 577. The Court explained:

> The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

Id. at 577-78 (authorities omitted). This Court expressed similar concern in *United States v. Banks*, 540 U.S. 31 (2003). "[T]he Court of Appeals's overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes." 540 U.S. at 42.

In this way, the Eighth Circuit's adoption of a presumption of reasonableness distorts the meaning of section 3553(a) and the reasonableness review *Booker* adopted. The presumption encourages, if it does not demand, "the sort of rote, mechanistic reliance on the Guidelines that Justice Stevens's merits opinion found constitutionally problematic." Berman, *Reasoning Through Reasonableness* at 143. Accordingly, it is inconsistent with both section 3553(a) and *Booker*.

3. The Eighth Circuit's view that district courts wield a "limited range of choice" misconstrues *Booker*'s "reasonableness" review as a means to maintain the Guideline's preeminence.

Booker did not enunciate its new "reasonableness" standard of appellate review to enhance the prominence of the now advisory guidelines. Instead, *Booker* excised 18 U.S.C. § 3742(e)'s standards of appellate review because of its cross-reference to now-excised section 3553(b) and its enforcement of mandatory guidelines through *de novo* review of decisions to depart from the guidelines. *See* 543 U.S. at 260. To fill the resulting void and preserve appellate review, the Court established a new standard requiring appellate courts "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)." 543 U.S. at 261. This standard mirrored the review for reasonableness explicitly set out in the statute before 2003. *See* 543 U.S. at 260-61 (citing section 3742(e) (1994 ed.)). Thus, the Court rejected the changes to appellate review inserted by the PROTECT Act,[1] which were designed "to make Guidelines sentencing even more mandatory than it had been." 543 U.S. at 261. These amendments "ceased to be relevant" under the advisory Guideline system required by the *Booker* remedy. *Id.* Furthermore, the Court recognized that in an advisory system, the Guidelines could not predominate as they had before. The appellate review for reasonableness surviving *Booker* did not and could not be used "to provide the uniformity that Congress originally

[1] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, § 401(D)(1), 117 Stat. 670.

sought to secure." *Id.* at 263. As *Booker* made clear, "that mandatory system is no longer an open choice." *Id.*

Three months after *Booker,* however, the Eighth Circuit cited *Booker*'s adoption of appellate review for reasonableness as holding that district courts have only a "limited range of choice" in which to depart downward from the Guidelines. *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005). The court of appeals started with a proposition that *Booker*'s "reasonableness" appeared to be consistent with the "abuse of discretion" standard, which, in turn, meant that district courts' sentencing discretion was cabined by "a limited range of choice" on the facts of any case. *Id.* Citing civil appeals regarding motions to dismiss, the Eighth Circuit then declared that, "[s]imilarly, reasonableness as a constraint on a district court's discretion to depart downward [from the Guidelines] infers a limited range of choice." *Id.*

The Eighth Circuit's conclusion that this Court adopted *Booker*'s reasonableness review as a means to *limit* the district court's discretion to vary from the Guidelines betrays a basic failure to grasp the purpose for the *Booker* remedy. The limited discretion afforded district courts to impose non-Guidelines sentences lay at the heart of the Sixth Amendment violation in the Guidelines as they existed prior to *Booker*. 543 U.S. at 234 ("[T]he availability of a departure in specified circumstances does not avoid the constitutional issue. . . . In most cases . . . no departure will be legally permissible."). Far from suggesting limited discretion in the district court's options, the "reasonableness" review that *Booker* prescribed rested on a premise of greater district court discretion to evaluate and consider the broader range of issues comprehended by section 3553(a)'s factors and purposes. *See Booker*, 543

U.S. at 260-61. The examples of appellate review the Court provided manifested great deference to the district court's determination of the degree to which the court should depart. *See id.* at 262-63. In fact, the Eighth Circuit opinions reviewing pre-PROTECT Act departures stressed the heavy deference owed a district court's judgment on the degree of departure. *See United States v. Passmore,* 984 F.3d at 938; *United States v. Lang*, 898 F.2d 1378, 1380 (8th Cir. 1990) (citing district court's superior feel for the case "[w]e will not lightly disturb decisions to depart . . . or related decisions implicating degrees of departure."). The Eighth Circuit's decision that "reasonableness" review granted appellate courts the authority to second-guess the weight sentencing judges gave to, or withheld from, particular factors ignores the critical nature of *increased* district court discretion to the constitutional remedy adopted in *Booker*.

II. A requirement that sentencing judges cite extraordinary circumstances to justify a sentence that arithmetically constitutes a substantial variance from the Guidelines is inconsistent with *Booker*.

The second question that this Court posed to Claiborne is whether in determining to impose a below-Guidelines sentence, "is it consistent with *United States v. Booker,* 543 U.S. 220 (2005), to require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?" The answer is no.

A. Requiring "extraordinary justification" as a threshold for non-Guidelines sentences revokes the discretion on which *Booker*'s constitutional remedy depends.

The Eighth Circuit's requirement of extraordinary justifications for downward "variances" does little more than echo the standards for downward departures that were part of the Guidelines when *Booker* was decided. *See* 18 U.S.C. § 3553(b)(1) (Supp. 2004). This departure potential failed to cure the constitutional defects in the mandatory Guidelines regime. *See Booker,* 543 U.S. at 234. Consistent with Justice Breyer's remedial opinion for the Court in *Booker,* Justice Stevens's opinion for the Court on the merits described exactly what would be necessary to make the Guidelines constitutional (in the absence of an engrafted right to jury determination of enhancing facts):

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.

Id. at 233; *see also id.* at 245.

The *Booker* remedy required an "effectively advisory" Guidelines system to negate the mandatory nature of the presumptive regime in section 3553(b)(1) "that require[d] sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." *Id.* at 258. The limited departures allowed by Section 3553(b)(1), based on circumstances "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" had the practical effect of making departures unavailable in most cases.

Id. at 234. Thus district courts' limited departure discretion was available in too few cases to render the system advisory in the manner that *Booker* deemed necessary to cure the Sixth Amendment violation. Similarly, the discretion possessed by Washington state trial judges in deciding whether "compelling" circumstances existed to depart from that state's Guidelines system failed to prevent the Sixth Amendment violation created by that jurisdiction's mandatory sentencing scheme. *See Blakely v. Washington*, 542 U.S. 296, 305 n.8 (2004). "The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself." *Booker,* 543 U.S. at 234.

The Eighth Circuit, however, has distorted *Booker*'s remedy by severely shrinking the discretion district courts have to impose sentences below the levels required by Guidelines-mandated and judicially-determined facts. First, the Eighth Circuit directs courts to presume the Guidelines are reasonable. *See* JA at 90. Next, the Eighth Circuit limits district courts' discretion to sentence below the Guidelines by requiring justification "'proportional to the extent of the difference between the advisory range and the sentence imposed.'" *See* JA at 90-91 (quoting *United States v. Johnson,* 427 F.3d 423, 426-27 (7th Cir. 2005)). By definition, extraordinary circumstances can exist in only a few cases. Thus, by presuming the Guidelines reasonable and then requiring extraordinary circumstances to sentence below the Guidelines, the Eighth Circuit removes the discretion essential to an advisory Guidelines system.

In fact, the prior departure standards may have allowed greater discretion than the Eighth Circuit's new

presumption of Guidelines reasonableness and extraordinary circumstances threshold for non-Guidelines sentences. Even the "mandatory" Guidelines placed "essentially no limit on the number of potential factors that may warrant a departure." *Koon v. United States*, 518 U.S. 81, 106 (1996) (quoting *Burns v. United States,* 501 U.S. 129, 136-37 (1991)). In contrast, the Eighth Circuit's approach has led it to declare that even a defendant's "dramatic" rehabilitation does not satisfy the "extraordinary circumstances" threshold. *See United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006) (defendant's "dramatic" rehabilitation did not justify "extraordinary" deviation from guidelines); *United States v. Gall*, 446 F.3d 884, 889-90 (8th Cir. 2006) (same); *United States v. Medearis*, 451 F.3d at 921 (rehabilitation "cannot be allowed to trump all the other considerations listed in § 3553(a).").

Even under a mandatory Guidelines system, this Court rejected the government's effort to limit district courts' departure discretion by requiring departures to be justified by facts advancing a specific goal under section 3553(a). *See Koon,* 518 U.S. at 108. Such a limitation on departure authority is quite similar to the Eighth Circuit's "extraordinary circumstances" requirement, yet this Court rejected it. *See id.* Instead, *Koon* provided a definition of reasonableness drawn directly from section 3553(a)'s command that district courts balance sufficiency and necessity:

> The statute requires a court to consider the listed goals in determining 'the particular sentence to be imposed'. . . . The statute says nothing about requiring each potential departure factor to advance one of the specified goals. So long as the

> overall sentence is 'sufficient, but not greater than necessary, to comply' with the above-listed goals, the statute is satisfied.

Id. The crucial point is satisfying the statute, section 3553(a), for *Booker* holds that the sentencing discretion that section 3553(a) affords creates an advisory system consistent with Sixth Amendment requirements. *See* 543 U.S. at 233, 245. The Eighth Circuit frustrates and subverts the discretion essential to this advisory system's constitutionality by (1) presuming the guidelines reasonable and (2) also requiring "extraordinary circumstances" to justify arithmetically substantial variances below the Guidelines range.

B. The Eighth Circuit's requirement that substantial variances from the Guidelines be justified by extraordinary circumstances frustrates and subverts the discretion essential to an advisory Guidelines system centered on section 3553(a)'s factors and purposes.

Booker cured the Sixth Amendment problems of the mandatory Guidelines system by anchoring sentencing on section 3553(a) instead of the Guidelines. *See* 543 U.S. at 260-61. Thus, district courts acquired sentencing authority to the full extent permitted by section 3553(a). *See id.* *Booker* also anchored the appellate review process on section 3553(a), and further emphasized the importance of the district courts' sentencing discretion to an advisory Guidelines system by illustrating the appellate standard of review with highly deferential pre-*Booker* decisions. *See id.* at 262-263. These decisions recognized that sentencing involves the district court's "refined assessment of the

many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 581 U.S. at 98. The exercise of a district court's sentencing discretion

> [i]mplies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. Discretion means the equitable decision of what is just and proper under the circumstances."

The Styria v. Morgan, 186 U.S. 1, 9 (1902) (internal quotations omitted) (emphasis in original). "[Discretion] takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result." *Burns v. United States*, 287 U.S. 216, 223 (1932) (internal quotations omitted).

The cases this Court used to illustrate post-*Booker* reasonableness review all reflected and employed such deference. See *Booker*, 543 U.S. at 262; *United States v. Salinas*, 365 F.3d at 588. The pre-PROTECT Act review of guidelines departures, to which the Court also compared post-*Booker* reasonableness standard, 543 U.S. at 261-62, likewise reflected great deference to a district court's judgments about whether to depart from the Guidelines and, particularly, the extent of departure warranted. *See, e.g.*, *United States v. Diaz-Villafane*, 874 F.2d at 49 (district court makes judgment call upon evaluation of "flesh and blood" defendant); *United States v. Lang*, 898 F.2d at 1380 (same).

The Eighth Circuit's imposition of a requirement that the district court find extraordinary circumstances to

justify sentences that vary in an arithmetically substantial way from the advisory Guidelines further distorts the deferential review that *Booker* established. *See* JA at 91. First, this requirement subjugates all other section 3553(a) factors to the cold numeric calculation of the Guidelines grid. While appellate courts may be equally capable of matching numbers on a grid, they lack the vantage to second-guess a district court's assessment of a particular sentence's effect on a living and breathing defendant's potential for rehabilitation, reintegration, and re-offending. *See United States v. Passmore,* 984 F.3d at 938. Appellate review anchored to the Guidelines effectively extinguishes the deference due the district courts' superior vantage point to gauge non-Guidelines factors.

In addition, the Eighth Circuit's focus on the arithmetical degree of variation from the Guideline produces absurd results. A term of probation, no matter how long, becomes an extraordinary, 100 percent variance, even compared to a Guidelines sentence of only 12 months. *Compare United States v. Ture*, 450 F.3d at 357 (two years probation constituted 100 percent variance from Guideline range calling for twelve-month imprisonment) *with United States v. Kicklighter*, 413 F.3d 915, 918 (8th Cir. 2005) (36 percent difference between 120-month sentence and 188-months Guideline range in methamphetamine conspiracy was within "limited range" of choice and justified by rehabilitative progress despite the defendant's "horrible" criminal history). The court of appeals accused the district court of granting Claiborne an extraordinary variance for no other reason than the mathematical calculation that 15 months varied by 60 percent from the low end of his Guideline range, which was 22 months higher. *See* JA at 91. Yet, a 10-year variance from a 360-month Guideline

sentence would only be a 33 percent variance. Moreover, the focus on the arithmetic variation skews the consideration of shorter sentences. Because such sentences deal with smaller numbers at the low end of the Guidelines grid, small variances will produce large percentage variations. *See United States v. Wallace*, 458 F.3d 606, 613 (7th Cir. 2006) (24 months less than a 25 month Guidelines term is a 96 percent variance, 24 months less than a 240 month Guidelines sentence is a 10 percent variance). The Eighth Circuit's focus on arithmetic, therefore, leads to overzealous scrutiny of short sentences in which non-Guidelines factors important to the exercise of discretion under section 3553(a) play a more significant role. *See, e.g., United States v. Likens*, 464 F.3d at 824 (reversing three years probation that judge based on defendant's non-violent background and need for drug treatment, as "extraordinary" 100 percent variance from Guidelines range of 15-21 months); *United States v. Gall*, 446 F.3d at 890 (three years probation that judge based on exemplary post-offense conduct – completing degree, starting business, and defendant's youthful immaturity when he joined drug conspiracy he abandoned – reversed because Guidelines advised 30 months prison). An arithmetically "extraordinary" variation may actually reflect the mean percentage variation that judges grant. *See United States v. Saenz*, 428 F.3d 1159, 1162 (8th Cir. 2005) (50 percent variance for substantial assistance was "extraordinary"); *United States v. Saenz*, 429 F. Supp.2d 1081, 1090-92 (N.D. Ia. 2006) (on remand) (Sentencing Commission data reveal the median percent decrease from guidelines for substantial assistance cases is 49.9 percent overall, and 45.8 percent for substantial assistance in drug trafficking cases). The anomalies invited by such categorizations of non-guidelines sentences promote the same disrespect for

criminal judgments that prompted Congress to institute guidelines in the first place. *See Mistretta v. United States*, 488 U.S. 361, 365-66 (1989).[2] *Cf. United States v. Wallace*, 458 F.3d at 613 ("We are reluctant to distill reasonableness review into a numbers game that relies only on a numerical or percentage line for reductions"; court instead orders district judge to give "World Series" explanation for "World Series" break in sentence).

Thus, contrary to *Booker*, the Eighth Circuit refocuses all sentencing consideration on the Guidelines with its (1) presumption of Guideline reasonableness, (2) requirement of extraordinary circumstances, and (3) focus on arithmetic variation from the Guidelines range. *Booker*'s excision of section 3553(b)(1), rendered the Guidelines just one of the seven factors the district court shall consider. *See* 543 U.S. at 260-261. This Court focused sentencing on section 3553(a) without dictating how district courts should resolve the interplay of the statute's purposes and factors with the facts of particular cases:

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[2] The Eighth Circuit tacitly acknowledged the folly in its mathematical categorizations in *United States v. Maloney*, 466 F.3d 663 (8th Cir. 2006). Conceding that terms like "dramatic" variance evade precise definition, the Eighth Circuit maintained the usefulness of either percentage based comparisons of sentence length, or comparisons of "the number of offense levels traversed by a variance." *Id.* at 668. The court of appeals explained that the later approach seemed "more in keeping with our assigned role to further the objectives of the Sentencing Reform Act, because the guidelines system established by the act was designed to adjust sentences incrementally by offense level, rather than percentages." *Id.* This attempt to mitigate the irrational impact of the court of appeals's percentage-based categorizations further betrays the court's misconstruction of reasonableness review as a means to enforce the former Guidelines system.

> The statute provides no order of priority among all those factors. . . . The statute – absent the mandate of §3553(b)(1) – authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines.

Id. at 304-05 (Scalia, J., dissenting). The Eighth Circuit's application of a presumption of reasonableness in the Guidelines range and its demand for arithmetically calibrated justifications as a threshold for non-Guidelines sentences grants the Guidelines controlling dominance directly contrary to *Booker* and section 3553(a).

C. Appellate review requiring extraordinary justifications for non-Guidelines sentences inappropriately substitutes the appellate court's limited view of Guidelines' primacy for the district court's evaluation of section 3553(a)'s factors and purposes in particular cases.

The Eighth Circuit's simplistic, percentage-based analysis invites the cookie-cutter sentencing that the Sixth Amendment prohibits when predicated on judicial fact-finding. *See Booker,* 543 U.S. at 312 (Scalia, J., dissenting in part). With its requirement of extraordinary circumstances to justify substantial variances from the presumptively reasonable Guidelines, the Eighth Circuit effectively substitutes its judgment for the district court's. Claiborne's case illustrates this point.

First, the Eighth Circuit felt free to substitute its "factual" findings, by asserting, "it is a fair inference that

Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police." *See* JA at 91. No accusation, much less evidence, appeared in the record to support this assertion.[3] Even the Guidelines require a district court's findings about drug quantity to rest on a preponderance of evidence rather than extrapolation from other conduct. *See, e.g., United States v. Caldwell,* 88 F.3d 522, 527 (8th Cir. 1996) (proof that defendant trafficked in particular quantity in 1993 does not support conclusion he trafficked in same quantity each of the preceding three years).[4] Based on its presumption of Guidelines reasonableness, the *Claiborne* court dismissed two aspects of the district court's judgment – the small quantity of crack and

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[3] To qualify for the safety valve, a defendant must "not later than the time of the sentencing hearing . . . truthfully provide[] to the Government all information and evidence concerning the offense or offenses. . . ." U.S.S.G. §5C1.2(5). Claiborne sent the government a letter that the government accepted as fulfilling this requirement. *See* JA at 49-51; 54. Nothing in this letter supports the court of appeals's "fair inference." Claiborne described conduct occurring before May 14, 2003, the date he was arrested on the charge in Count One of the superseding indictment. *See* JA at 50. He then recounts how his involvement with drugs on November 3, 2003 occurred by happenstance. *See* JA at 50-51. There is nothing in the letter to suggest that Claiborne "distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police." JA at 91.

[4] The Eighth Circuit's speculation that Claiborne engaged in additional crimes involving additional quantities without any evidence or accusation seems antithetical to the same basic principles of fairness and confrontation underlying *Booker* and *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004). An appellate court's invocation of phantom crimes lacking even an initial complaint cannot be what Congress intended as "real conduct" relevant to sentencing. *Booker*, 543 U.S. at 252. *Compare Washington v. Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) (defendant charged with one crime was convicted of another, "*sans* charge, jury instruction, or jury verdict").

Claiborne's clean criminal record – as sufficiently accounted for by the Guidelines. *See* JA at 91. This reasoning, however, simply replicates the pre-*Booker* evaluation of departures found in section 3553(b), which *Booker* excised. Indeed, in asserting that "'[a]n extraordinary reduction must be supported by extraordinary circumstances,'" the *Claiborne* court quoted an appellate review of a departure from a Guidelines sentence for substantial assistance under U.S.S.G. §5K1.1. *See* JA at 91 (quoting *United States v. Dalton,* 404 F.3d 1029, 1033 (8th Cir. 2005)). Thus, the Eighth Circuit treated the district court's judgment as failing to establish a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . ." 18 U.S.C. § 3553(b). The court of appeals substituted its judgment presuming reasonableness in the Guidelines for the district court's reasoning and judgment. *See* JA at 90-91. This substitution is entirely inconsistent with the *Booker*-required deference. *See* 543 U.S. at 262.

The reasonableness review *Booker* retained, consistent with the pre-2003 version of Section 3742(e), does not authorize an appellate court to "substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Koon*, 518 U.S. at 97 (quoting *Solem v. Helm,* 463 U.S. 277, 290 n.16 (1983)). Appellate courts lack the institutional advantage of the district court in assessing the capacities of the living and breathing person who will bear the judgment chosen. *See United States v. Diaz-Villafane,* 874 F.2d at 49. Dissenting from the Eighth Circuit's application of its presumption of Guidelines reasonableness and extraordinary circumstances requirement, one judge vividly illustrated this point:

> In his tenure as a federal district judge, Judge Pratt has sentenced approximately nine hundred ninety offenders. We have reviewed only a minuscule number of those cases. Judge Pratt has had the experience to decide the fate of more than nine hundred real people, all of whom he has looked in the eye when imposing a sentence.

United States v. Likens, 464 F.3d at 827 n.1 (Bright, J., dissenting).[5] The district judge in Claiborne's case obviously relied on her similarly long experience in sentencing in many cases, only a minuscule number of which reached the court of appeals, when she compared Claiborne's situation to other individuals she had sentenced for similar crimes. JA at 72. Yet, the Eighth Circuit dismissed this institutionally superior experience merely by reference to the Guidelines. *See* JA at 90-91.

Notwithstanding the appellate courts' deficient vantage to make such evaluations, the Eighth Circuit's reversal of below-Guidelines sentences increasingly include categorical declarations that rehabilitative needs do not justify "dramatic" or "extraordinary" variances. *See McMannus*, 436 F.3d at 875 ("While we can identify factors that may warrant a minor variance from the guidelines range, e.g., McMannus put himself through community college while on pretrial release, see 18 U.S.C. § 3553(a)(1),

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[5] Section 3553(a) requires sentencing courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Because courts of appeal see only a relatively small number of cases, they are in a poor position to determine whether sentences constitute unwarranted disparity. The government's ability to select the cases it chooses to appeal also skews the ability of the courts of appeal to know what is actually happening at the district court level. *See McDonald,* 461 F.3d at 956 n.7.

we find nothing in the record which would justify a variance of this magnitude under § 3553(a)."); *United States v. Lazenby*, 439 F.3d at 933 (defendant's "dramatic" rehabilitation did not justify "extraordinary" deviation from Guidelines); *United States v. Gall*, 446 F.3d at 889-90 (district court gave too much weight to defendant's withdrawal from conspiracy, too little weight to the danger of the crime, and too much emphasis on defendant's post-offense rehabilitation); *United States v. Medearis*, 451 F.3d at 921 (defendant's rehabilitation "cannot be allowed to trump all the other considerations listed in § 3553(a)"). These broad judgments go well beyond the deferential review for reasonableness prescribed in *Booker* and materially inhibit non-Guidelines judgments.

Out of constitutional necessity, *Booker* chose an advisory Guidelines system that makes the informed discretion of district courts paramount.

> *Booker* and § 3553(a) thus demand that federal sentencing judges exercise reasoned judgment by filtering the Guidelines' advice through the provisions of § 3553(a); by doing so, district judges avoid giving any particular judge-found fact a "determinate" role in calculating the sentence, and thereby avoid the constitutional problem identified in *Booker*.

Berman, *Reasoning Through Reasonableness* at 142-43. In Claiborne's case, the district court's judgment fully and reasonably complied with each portion of section 3553(a), including the required consideration of the advisory Guidelines range. The district judge rationally explained her judgment that the Guidelines range was excessive in light of her own experience and the nature and circumstances of Claiborne's crimes and the history and characteristics of Claiborne himself. She also expressed her belief

that a 15-month sentence was sufficient but not greater than necessary to satisfy section 3553(a)'s sentencing purposes. In substituting its judgment for the district court's, the Eighth Circuit ignored the district court's concern that a Guidelines sentence would be tantamount to throwing Claiborne away, pointing to nothing as a basis for disagreement other than the Guidelines, its presumption of reasonableness, and its requirement of extraordinary circumstances to justify "extraordinary" variances from the Guidelines. Nothing in *Booker* sanctions this usurpation of constitutionally necessary sentencing discretion.

CONCLUSION

For the foregoing reasons, Claiborne respectfully requests that the Court reverse the court of appeals and remand with directions to affirm the district court's judgment and sentence.

Dated December 18, 2006.

Respectfully submitted,

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STATUTORY ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;

and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(b) Application of guidelines in imposing a sentence. –

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses – [omitted].

18 U.S.C. §3553(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

> **(1)** is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> **(2)** is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

18 U.S.C. §3661. Use of information for sentencing

> No limitation shall be placed on the information concerning the background, character, and conduct of a

person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3742. Review of a sentence

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(c) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

21 U.S.C. §841(a), (b)(1)(C)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of

supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which

may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a

violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. §844(a)

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or

intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains

cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

FILED
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SUPREME COURT, U.S.

No. 06-5618

In the Supreme Court of the United States

MARIO CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Was the district court's choice of below-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

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OPINION BELOW

The opinion of the court of appeals (J.A. 88-91) is reported at 439 F.3d 479.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2006. A petition for rehearing was denied on April 27, 2006 (J.A. 93). The petition for a writ of certiorari was filed on July 26, 2006, and was granted on November 3, 2006, limited to the questions specified by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-30a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1), and possessing more than five grams of cocaine base, in violation of 21 U.S.C. 844(a). He was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated the sentence and remanded for resentencing.

1. On May 14, 2003, police detectives patrolling an area in St. Louis, Missouri, observed drug trafficking and decided to make a controlled purchase. An undercover detective drove past petitioner, who was standing on the sidewalk, and petitioner flagged him down. The detective stopped the car and told petitioner that he wanted $20 worth of crack cocaine. Petitioner got in the car and handed the detective a plastic bag containing what appeared to be crack. In return, the detective gave petitioner a marked $20 bill. When petitioner left the car, the police arrested him and seized the marked bill from his pocket. A laboratory analysis revealed that the substance in the plastic bag was .23 grams of cocaine base. Petitioner later admitted that he had been in the area to sell crack almost every night for about two and a half months before his arrest. J.A. 14, 50, 88-89; Sealed J.A. 4.

Petitioner was charged with a state drug offense and referred to a drug-court program, in connection with a deferred prosecution. On November 2, 2003, while subject to the diversion program, petitioner was arrested again. Police officers responded to complaints of drug sales at a house at 3455 Oregon. When they arrived, they saw petitioner and another person engaged in what appeared to be a drug transaction on the front porch of the house. When petitioner and the other man saw the officers, petitioner threw down a plastic bag con-

taining what appeared to be crack cocaine, entered the house with the other man, and locked the door. The two men then left the house through the rear. Petitioner ran back toward the front and entered a nearby house without the permission of the occupants, Mary Clemons and her daughter and grandchildren. Petitioner then ran out the back of that house and escaped. A short time later, the officers arrested petitioner at his own house, a few blocks away. A laboratory analysis of the substance petitioner had discarded revealed that it was 5.03 grams of cocaine base. J.A. 14-15, 50-51, 55-58, 89; Sealed J.A. 4-6.

Petitioner was charged in a superseding indictment with distributing cocaine base in May 2003 and possessing more than five grams of cocaine base in November 2003. He pleaded guilty to both charges. J.A. 1-2, 7-16; Sealed J.A. 3.

2. After the guilty plea but before sentencing, see J.A. 1-3, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. *Id.* at 226-244. As a remedy for that constitutional violation (*id.* at 244-268), the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory nature of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," under

which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.

3. a. Petitioner faced a statutory sentence of up to 20 years of imprisonment on each count. J.A. 11. In calculating petitioner's offense level, the Presentence Investigation Report (PSR) began with a base offense level of 26 under the drug-trafficking Guideline, Section 2D1.1(a)(3) and (c)(7), because the amount of crack exceeded five grams; added two levels under Section 3C1.2 because petitioner recklessly created a substantial risk of death or serious bodily injury when he fled into the Clemons home; and subtracted three levels for acceptance of responsibility under Section 3E1.1. That calculation resulted in a total offense level of 25, which, when combined with a criminal history category of I, yielded a Sentencing Guidelines range of 57 to 71 months of imprisonment. Because the offense involved more than five grams of cocaine base, however, petitioner was subject to a statutory minimum prison term of five years under 21 U.S.C. 844(a). Under Sentencing Guidelines § 5G1.1(c)(2), the advisory range was therefore 60 to 71 months. Sealed J.A. 5-6, 9.

Petitioner objected to the PSR, claiming that an enhancement for reckless endangerment was unwarranted. He also claimed that he satisfied the "safety valve" criteria of 18 U.S.C. 3553(f) and Sentencing Guidelines § 5C1.2. The district court sustained the objections, thus lowering the advisory range and eliminating the statutory mandatory minimum. As a consequence of those rulings, petitioner's offense level was 21, and his Guidelines range was 37 to 46 months. J.A. 24-30, 53-63, 69; Sealed J.A. 15.

b. Petitioner urged the district court to impose a sentence below the advisory Guidelines range. He argued that a lower sentence was warranted because of the relatively small amount of drugs seized from him; his status as a street-level

dealer; the fact that he had not engaged in any dangerous or aggravating conduct; the disparity between crack-cocaine and powder-cocaine sentences; his family's reliance on him; his lack of criminal history and positive post-arrest conduct, which, he claimed, indicated that he was unlikely to commit crimes in the future; and his youth (he was born in December 1983). J.A. 19-23, 30-31, 63-67; Sealed J.A. 2.

In response, the government argued that the facts did not support petitioner's assertion that he was unlikely to commit additional crimes and that petitioner's commission of a second drug offense six months after his first arrest proved the contrary. In any event, the government pointed out, the "safety valve" had already substantially reduced petitioner's sentencing range based on his lack of criminal history and assumed lower likelihood of recidivism. The government also noted that petitioner's economic support for his family had, by his own admission, come in part from dealing drugs; that he had engaged in dangerous, aggravating conduct in invading the Clemons home; and that the difference in sentences between crack cocaine and powder cocaine reflected a permissible policy decision by Congress, the body with the authority to make such decisions. J.A. 34-35, 59-60, 67-69.

c. In announcing its sentence, the district court expressed concern that petitioner would commit additional drug offenses:

> You pled guilty to * * * two separate sales. You were arrested after the first sale, but that didn't stop you. You went ahead and sold again.
>
> * * * And I can't figure out if you were just unlucky or if you're stupid. I hope you are not stupid, because if you are, you're going to do this again. Selling drugs is not the way to support yourself [and] your family. * * *

> * * * I hope you give some serious thought to that, because I am very concerned that, because you're so young, you don't fully realize the effect of what you've done has on your family and what it is going to have on you and your future.

J.A. 69-70. The court also expressed the view that petitioner's drug crimes were "very serious" and that his invasion of the Clemons' home was "unforgivable." J.A. 71-72.

The district court went on to explain, however, that it believed that a sentence of 37 months, the bottom of the Guidelines range, would be excessive:

> I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.
>
> However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.
>
> I don't think that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger—a much [sic] amount of drugs—and the sentence that they receive, I don't believe that 37 months is commensurate in any way with that.

> As I said before, I do believe some term of imprisonment is appropriate in your case. And I hope that you don't view this as just the cost of doing business.

J.A. 71-72. The court then imposed a sentence of 15 months of imprisonment. J.A. 72, 78; Sealed J.A. 17.

4. The government appealed, contending that "the sentence [w]as unreasonable under 18 U.S.C. § 3553(a)." J.A. 88. Agreeing with the government, the court of appeals vacated the sentence and remanded for resentencing. J.A. 88-91.

The court of appeals noted that, although the Sentencing Guidelines are no longer mandatory, district courts are still required to take them into account, together with the other sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). J.A. 89. The court explained that, when, as in this case, the district court has correctly calculated the advisory Guidelines range, the court of appeals will "review the resulting sentence for reasonableness, a standard akin to * * * traditional review for abuse of discretion." J.A. 90. "A 'range of reasonableness,'" the court stated, "is within the [district] court's discretion." *Ibid.* (citation omitted). The court observed that a sentence within the advisory Guidelines range "is presumed reasonable," because the "Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study." *Ibid.* The court added, however, that a sentence outside the advisory Guidelines range will also be found reasonable "so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a)," with a proportionately more compelling justification required as the extent of the variance from the Guidelines range increases. *Ibid.* (quoting *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005)). In particular, the court said, "[a]n extraordinary reduction must be supported

by extraordinary circumstances." J.A. 91 (quoting *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005)).

Applying those principles, the court of appeals held that the sentence imposed in this case was unreasonable. J.A. 90-91. The court explained that the 15-month sentence reflected a "sixty percent downward variance" from the bottom of the 37-to-46-month advisory Guidelines range, that 60% was "an extraordinary variance," and that it was "not supported by comparably extraordinary circumstances." *Ibid.* In finding a lack of extraordinary circumstances, the court explained that petitioner's lack of criminal history "was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence"; that the small quantity of drugs "was taken into account in determining his guidelines range" and that it was a "fair inference" that he "distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police"; and, finally, that petitioner "committed a second serious drug offense six months after his first arrest," such that he "has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency." J.A. 91.

SUMMARY OF ARGUMENT

I. A court of appeals conducting reasonableness review under *United States* v. *Booker*, 543 U.S. 220 (2005), should apply a principle of proportionality to assess whether a non-Guidelines sentence that varies significantly from the advisory range is a reasonable sentence. Such a principle is essential to fulfill *Booker*'s expectation that appellate review would move sentences in Congress's preferred direction of greater uniformity.

The undisputed central purpose of the Sentencing Reform Act of 1984 (SRA) was to reduce unwarranted disparities in sentencing. Among the means for achieving that aim were

creation of an expert agency to promulgate Sentencing Guidelines, a legislative definition of the purposes of sentencing, and appellate review to reduce disparate outcomes. *Booker* held that the mandatory character of the Sentencing Guidelines violated the Sixth Amendment. But the Court remedied that defect by severing the provisions mandating compliance with the Guidelines and leaving intact other critical features of the SRA that it believed would further Congress's "basic sentencing intent" of moving sentences towards greater uniformity. 543 U.S. at 264. One of those features was appellate review.

Proportionality review is a critical means of ensuring that appellate review succeeds in tending "to iron out sentencing differences." *Booker*, 543 U.S. at 263. Review for unreasonableness must be tied to objective, quantitative benchmarks or it cannot reduce unwarranted disparity. Courts of appeals cannot create national measures of generally fair and just sentences. And review of sentences ad hoc would defeat Congress's basic purpose of tending to increase sentencing uniformity. The Sentencing Guidelines provide the only nationally uniform, congressionally endorsed integration of the purposes of sentencing under the SRA.

Proportionality review, which requires a substantial justification for a substantial variance from the Guidelines norm, comports with the remedial decision in *Booker*, the remaining provisions of the SRA, and Congress's intent to reduce sentencing disparity. Indeed, petitioner and his amici offer no alternative that would even roughly reduce disparity. To the contrary, petitioner's vision of reasonableness review would abdicate the appellate function and abandon any hope of avoiding the disparities that prompted the SRA.

Nothing in a proportionality approach contravenes the Sixth Amendment. The Court confirmed in *Booker* that a judge's selection of a sentence from within a defined range

does not implicate the Sixth Amendment; the Sixth Amendment is violated only when the judge is legally prohibited from increasing a sentence beyond a specified level absent the finding of a fact neither found by the jury nor admitted by the defendant. The proportionality principle does not require a factual finding to exceed a defined range. A judge may sentence outside the Guidelines range based on the facts found by the jury alone and based on a virtually unlimited universe of facts. Proportionality review, of course, does limit the extent of such variances. But *Booker*'s provision for reasonableness review necessarily determined that the Sixth Amendment permits an appellate court to reject a statutorily authorized sentence where no persuasive justification supports it.

No other Sixth Amendment objection casts doubt on proportionality review. Appellate insistence on a strong justification for an usually harsh or lenient sentence does not reinstate mandatory Guidelines. And the experience of courts of appeals provides no support for the view that a proportionality principle deters district courts from exercising their discretion under *Booker*.

II. Petitioner's sentence violates the proportionality principle, and is unreasonable, because the district court varied substantially from the advisory Guidelines range without providing a substantial justification. The district court imposed a sentence of 15 months of imprisonment, which is 22 months, and nearly 60%, below the advisory Guidelines range of 37 to 46 months. The first three stated justifications—petitioner's lack of a criminal record; the drug quantities involved; and his eligibility for the "safety valve"—are common features in a drug case and are, indeed, fully accounted for in calculating the Guidelines range. That does not prohibit the court from relying on those considerations, but it does mean that they cannot justify a substantial variance without inviting widespread disparities. The district court did not find that the

first three considerations made the case unusual in any way, and there is no basis in the record for any such finding. If anything, petitioner's offense level and criminal history category *under*state his culpability: petitioner admitted that he sold crack nearly every day for approximately two and a half months before his first arrest, and he was arrested a second time less than six months later. Both facts point to an enhanced likelihood of recidivism, thus making the court's contrary view plainly unsound.

Nor can the last consideration—the assertion that the district court had imposed similar sentences on defendants who committed similar crimes—justify its substantial variance. Because the court did not identify the prior cases it had in mind, an appellate court cannot assess the accuracy of its assertion. Even if the assertion is credited, however, Congress's goal was one of *nationwide* sentencing uniformity, not uniformity in a single court. The goal of nationwide uniformity was undermined, not furthered, by the imposition of a sentence in this case far below the advisory Guidelines range.

ARGUMENT

I. APPELLATE REVIEW FOR REASONABLENESS SHOULD REQUIRE A STRONG JUSTIFICATION FOR A SENTENCE THAT SUBSTANTIALLY VARIES FROM THE ADVISORY GUIDELINES RANGE

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court preserved appellate review of sentences under the Sentencing Reform Act of 1984 (SRA or Act), 18 U.S.C. 3551 *et seq.*, under an implied standard of review for "reasonableness." *Id.* at 261-264. Although the Court did not "claim that the use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure" in the SRA, the Court expressed confidence that such appellate review would "tend to iron out sentencing differences," *id.* at 264, and thus "move

sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-265 (citing 28 U.S.C. 991(b)). As a majority of the courts of appeals have held, courts reviewing sentences for unreasonableness should apply a principle of proportionality to evaluate whether the sentences are justified based on the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). When a sentence varies substantially from the advisory Guidelines range, a strong justification should be required to establish that the sentence is a "reasonable" one.[1]

A principle that requires substantial variations to be justified by correspondingly strong reasons is essential if appellate review of sentences is to fulfill the function envisioned by this Court. As *Booker* recognized, effective appellate review is vital to advance Congress's basic goal of reducing unwarranted sentencing disparity. The proportionality principle enables appellate review to work together with the advisory Guidelines to move sentencing towards Congress's "basic objectives" of "avoiding excessive sentencing disparities" with

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[1] Eight courts of appeals have adopted the proportionality principle, and none has rejected it. See *United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006); *United States* v. *Bishop*, 469 F.3d 896, 907 (10th Cir. 2006); *United States* v. *Crisp*, 454 F.3d 1285, 1291-1292 (11th Cir. 2006); cf. *United States* v. *King*, 454 F.3d 187, 195 (3d Cir. 2006) ("significant departure must be adequately supported by the record"); *United States* v. *Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005) (greater explanation is required for sentence outside Guidelines range), cert. denied, 126 S. Ct. 1809 (2006). Cf. *United States* v. *Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) (court "ha[s] yet to adopt this standard").

sufficient room for individualized punishment. *Booker*, 543 U.S. at 265. Nothing in the SRA or the Sixth Amendment is inconsistent with use of a proportionality principle to identify unreasonable sentences that vary significantly from the advisory Guidelines.

A. The Primary Goal Of The Sentencing Reform Act Is To Reduce Unwarranted Disparities In Sentencing

1. For almost a century before the SRA's enactment in 1984, the federal system "employed * * * a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta* v. *United States*, 488 U.S. 361, 363 (1989). Further, the district court's "determination as to what sentence was appropriate met with virtually unconditional deference on appeal." *Id.* at 364.

As a result of that broad discretion, "[s]erious disparities in sentences * * * were common." *Mistretta*, 488 U.S. at 365. Disparities occurred "between Federal courts in different parts of the country, between adjoining districts, and even in the same districts." H.R. Rep. No. 85-1946, at 6 (1958). "[E]mpirical studies repeatedly showed that similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 883 (1990); see *id.* at 895-897; Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 306-307 (1996); United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 8 (1987) (*Supplementary Report*). Even more troubling, sentencing disparity was often highly correlated with the defendants' race, gender,

and class. See Nagel, 80 J. Crim. L. & Criminology at 883-884, 895-896; Gelacak, 81 Minn. L. Rev. at 306-307.

As early as 1958, Congress recognized and attempted to address the problem of disparity with "the creation of judicial sentencing institutes and joint councils, see 28 U.S.C. § 334, to formulate standards and criteria for sentencing." *Mistretta*, 488 U.S. at 365. But, despite those and numerous other efforts, intolerable disparity continued. See *id.* at 365-366; *Supplementary Report* 1-4. The underlying source of the problem—unguided and unreviewed judicial discretion in sentencing—remained. See S. Rep. No. 95-605, at 10, 881-883 (1977); S. Rep. No. 98-225, at 38, 41 (1983); Edward M. Kennedy, *Toward A New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 353-354 (1979); Gelacak, 81 Minn. L. Rev. at 307; *Appellate Review of Sentences*, 32 F.R.D. 249, 270 (1962). Ultimately, Congress—as well as jurists, practitioners, and academics—recognized that the "shameful disparity in criminal sentences [was] a major flaw in the existing criminal justice system" that demanded fundamental reform. S. Rep. 98-225, at 65; see *Supplementary Report* 8 & n.53; *e.g.*, The Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976); Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972). The call for reform culminated in the passage of the SRA in 1984. See Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987.

2. As this Court emphasized repeatedly in *Booker*, Congress's "basic goal" in enacting the SRA was to promote "increased uniformity" in sentencing and to reduce the unwarranted disparities that had plagued the prior discretionary sentencing regime. 543 U.S. at 253.[2] Even the dissenters

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[2] See, *e.g.*, 543 U.S. at 250 ("Congress' basic statutory goal" was "a system that diminishes sentencing disparity."); *id.* at 252 ("the sentencing statute's basic aim" was "ensuring similar sentences for those who have committed similar crimes in

agreed that "[t]he elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim." *Id.* at 292 (Stevens, J., dissenting). And legislators repeatedly stressed the disparity-avoidance goal in supporting the bills that led to the SRA. See, *e.g.*, 121 Cong. Rec. 37,562 (1975) (statement of Sen. Kennedy in introducing legislation that culminated in the enactment of the SRA); S. Rep. 95-605, at 10, 881-883 (describing legislation reported by Senate Judiciary Committee adopting sentencing reform proposal); S. Rep. 98-225, at 37-38, 41-49, 51-53, 65 (Senate Judiciary Committee Report describing bill that was ultimately enacted as the SRA).

The text of the Act embodies the disparity-avoidance goal in numerous provisions that are independent of the provision that made the Guidelines mandatory. The Act created the Sentencing Commission and required it to develop guidelines that "provide certainty and fairness in meeting the purposes of sentencing, [and] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. 991(b)(1)(B); see 28 U.S.C. 994(f). The Act also defined the purposes of sentencing that, "[f]or the first time, * * * will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy." S. Rep. 98-225, at 59; 18 U.S.C. 3553(a)(2). See also S. Rep. 98-225, at 38 (because pre-Guidelines sentencing was often based on an "outmoded rehabilitation model," and federal law failed to provide otherwise,

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similar ways"); *id.* at 253 ("Congress' basic goal in passing the [SRA] was to move the sentencing system in the direction of increased uniformity."); *id.* at 255 ("Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing."); *id.* at 256 ("Congress' basic statutory goal" was "uniformity in sentencing."); *id.* at 267 ("Congress' basic objective" was "promoting uniformity in sentencing.").

"each judge [was] left to apply his own notions of the purposes of sentencing," with the "result [that], every day Federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances"). And appellate review of sentences was understood as a vital means of checking unwarranted disparity. See 18 U.S.C. 3742 (2000 & Supp. IV 2004); S. Rep. 98-225, at 65 ("a mechanism to appeal" out-of-Guidelines sentences was considered "essential" if "the reforms [were] to be effective in reducing unwarranted sentencing disparity and achieving overall fairness"); *id.* at 151 (appeals by the government enable "the reviewing courts to correct the injustice arising from a sentence that was patently too lenient"; "This consideration has led most Western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considered it to be a critical part of the foundation for the bill's sentencing structure.").

B. *Booker* Envisions That Appellate Review And Advisory Guidelines Will Work Together To Achieve The SRA's Goal Of Reducing Unwarranted Disparities

1. In *Booker*, this Court held that the Sixth Amendment is violated when a district court imposes a sentence under mandatory Guidelines based on judicial fact-finding that increases the sentence beyond the maximum authorized by the facts reflected in the jury verdict or admitted by the defendant. 543 U.S. at 232-235. The Court therefore concluded that the mandatory Guidelines system enacted by the SRA was not constitutionally permissible. *Ibid.*

But the Court made clear that both the Guidelines and appellate review still have important roles in furthering the Act's original goal of reducing unwarranted sentencing dis-

parities. The Court selected the appropriate remedy for the Sixth Amendment violation by determining which of the available options would be most consistent with Congress's primary goal in enacting the SRA—"a system that diminishes sentencing disparity." *Booker*, 543 U.S. at 250. First, the Court concluded that requiring the jury to determine the facts that increase a defendant's sentence in a mandatory Guidelines scheme would impermissibly frustrate Congress's objectives, in particular its "basic goal in passing the Sentencing Act to move the sentencing system in the direction of increased uniformity." *Id.* at 253. Next, the Court rejected a return to the pre-SRA fully discretionary sentencing regime, with no appellate review, because, as compared with the limited severance that the Court ordered, it would manifestly fail to achieve Congress's purposes. *Id.* at 264-265. The Court concluded that neither of those options would advance the SRA's "basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *Id.* at 252; see *id.* at 246-258.

The Court held that a third option—severing the statutory provisions that made the Guidelines mandatory—would best advance Congress's basic goal in enacting the SRA. *Booker*, 543 U.S. at 264 ("the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent"). The Court therefore "severe[d] and excise[d] two specific statutory provisions"—18 U.S.C. 3553(b)(1) (Supp. IV 2004), which required district judges to sentence within the Guidelines range absent an aggravating or mitigating circumstance not adequately taken into account by the Guidelines, and 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which set forth stringent standards of appellate review designed to reinforce the mandatory character of the Guidelines. 543 U.S. at 259. Although the Court recognized that a non-mandatory Guidelines system is "not the system Con-

gress enacted," the Court concluded that it is "consistent with Congress' initial and basic sentencing intent" of reducing sentencing disparity. *Id.* at 264.

2. In reaching that conclusion, the Court stressed that two "features of the remaining system" will together "continue to move sentencing in Congress' preferred direction." *Booker*, 543 U.S. at 264. The first feature is a continued important role for the Sentencing Guidelines. The Court noted that "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Ibid.* The Court emphasized that, although the Guidelines will no longer be binding, district courts will be required to "consult those Guidelines and take them into account when sentencing." *Ibid.* A continuing role for the Guidelines will, the Court explained, help "avoid excessive sentencing disparities while maintaining flexibility to individualize sentences where necessary," as Congress intended when it enacted the SRA. *Id.* at 264-265.

The second feature on which the Court relied in concluding that the modified SRA will still advance Congress's original goal is appellate review. Noting that the Act, as modified, continues to provide for appellate review of sentences, *Booker*, 543 U.S. at 260 (citing 18 U.S.C. 3742(a) and (b)), the Court inferred a standard to guide that review. The Court held that courts of appeals should review sentences to determine whether they are "unreasonable," considering the sentencing factors in Section 3553(a) and "the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." *Id.* at 261 (quoting 18 U.S.C. 3742(e)(3)). The Court emphasized that unreasonableness review will play a central role in advancing Congress's original aim in enacting the SRA because it will "tend to iron out sentencing differences." *Id.* at 263. The

alternative—district court sentencing without the limits imposed by effective appellate review—"would cut the statute loose from its moorings in congressional purpose." *Id.* at 262.

The Court also indicated that appellate review will reinforce the role of the Guidelines in reducing disparity. Immediately after noting that the district courts are still required to take the Guidelines into account, the Court reiterated that the courts of appeals will "review sentencing decisions for unreasonableness." *Booker*, 543 U.S. at 264. The Court thus indicated that appellate review will work in tandem with a continuing important role for the Guidelines to ensure that the SRA as modified still advances its basic purpose.[3]

C. Proportionality Review, Using The Guidelines As A Benchmark, Is Essential To Implement The Remedial Scheme Adopted in *Booker*

Booker's remedial holding necessarily contemplates appellate review based on proportionality principles as applied to sentences that vary considerably from the advisory Guidelines range. A court's imposition of a sentence within the properly calculated advisory Guidelines range provides objective assurance that the sentence will likely accord with "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). A court's imposition of a sentence outside that range, however, must be subject to some

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[3] Petitioner incorrectly suggests (Br. 26) that *Booker* does not "grant the Guidelines * * * priority" over any other factor in Section 3553(b). Tellingly, petitioner relies for that assertion on quotes from the dissenting opinions. *Ibid.* (quoting *Booker*, 543 U.S. at 300 (Stevens, J., dissenting), and 543 U.S. at 304-305 (Scalia, J. dissenting)). The Court, however, did not embrace the dissent's view but instead stressed the role of the Guidelines in ensuring that the SRA (after severance) would promote Congress's basic objectives. See *Booker*, 543 U.S. at 264 (distinguishing the role that the Court envisioned the Guidelines would play from the dissent's description).

substantive proportionality review in order for appellate review to play the role that *Booker* envisioned of "iron[ing] out sentencing differences." *Booker*, 543 U.S. at 263.

1. Appellate review cannot limit unwarranted sentencing disparities unless it includes proportionality review based on a quantitative benchmark

a. Review for reasonableness requires benchmarks to support a judgment whether a sentence is consistent with the Section 3553(a) factors as applied to a particular case. Unless appellate review includes a tool for assessing whether a particular sentence is proportionate to the degree of punishment that is warranted and whether other judges would typically impose such a sentence in comparable cases, it cannot succeed in reducing unwarranted sentencing disparity. This is particularly important for sentences that vary substantially from the norm based on facts that are plainly unexceptional. If typical defendants can always receive sentences from zero months to the maximum punishment allowable under the statute, without any means for correction on appellate review, then appellate review will fail to move sentencing in the direction of uniformity, as *Booker* envisioned. And, by the same token, appellate review will fail to promote differentiation of the punishment of those who truly warrant exceptionally lenient or severe sentences. See, *e.g.*, *United States* v. *Davis*, 458 F.3d 491, 499 (6th Cir. 2006) ("most extreme variance" for defendant who does not deserve the most lenient punishment "leav[es] no room to make reasoned distinctions" between that defendant and other "more worthy defendants"), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006). As a result, unjustified and extreme sentencing disparities will evade reversal. To avoid that result, sentences that vary dramatically from the baseline must be reserved for those cases that present comparably strong justifications: sentences at or

near the top or bottom of the statutory range are unlikely to be reasonable unless those cases present either significantly egregious facts or significantly mitigating equities.

b. Appellate review must also include a proportionality inquiry if it is to advance the sentencing purposes set out in 18 U.S.C. 3553(a)(2). As Congress recognized when it enacted the SRA, a sentencing system cannot provide just punishment, promote respect for the law, afford adequate deterrence or protect the public if it permits typical offenders to receive sentences equal to those received by the most aggravated and dangerous offenders or the least culpable and threatening ones. See S. Rep. 98-225, at 38-39, 46, 75-76. Proportionality of the sentence to a defendant's actual conduct and particular circumstances is therefore inherent in the purposes of sentencing that Congress prescribed.

c. Courts of appeals cannot succeed in identifying typical cases and weeding out extreme sentences that lack justification unless they have an objective, consistent, and quantitative standard to use as a starting point. Absent such a benchmark, reviewing courts will be unable to compare the circumstances of different offenders and will be reduced to focusing only on the record in a particular case. But "[t]o construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective." *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc)), cert. denied, No. 06-5727 (Jan. 8, 2007).

2. The Sentencing Guidelines are the appropriate benchmark because they provide a concrete and generally accurate application of the factors in Section 3553(a)

a. The Sentencing Guidelines are the most suitable benchmark for proportionality review. The Guidelines provide con-

crete, quantitative applications of the factors in Section 3553(a) to various categories of federal offenses and offenders. And a sentence within the Guidelines range will generally be a reasonable one based on the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). As explained more fully in the government's brief in *United States* v. *Rita*, No. 06-5754 (*Rita* Br.), that is true for several related reasons.

First, the Guidelines integrate the congressional sentencing objectives in Section 3553(a). Congress required the Commission, in formulating the Guidelines, to consider factors identical to the ones that Section 3553(a) requires a district court to consider when imposing a sentence. And, consistent with Congress's direction, the Commission's formulation of the Guidelines sought "to balance all the objectives of sentencing." *Supplementary Report* 16. See *Rita* Br. 17-18, 19-20.

Second, the Guidelines reflect the expert and reasoned judgment of the Sentencing Commission about how to weigh the Section 3553(a) factors for particular categories of offenses and offenders, taking into account "the aggregate sentencing experiences of individual judges" across the country. *United States* v. *Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring), petition for cert. pending, No. 06-6155 (filed Aug. 23, 2006). The initial Guidelines were formulated based on a careful examination of a wide range of sentencing practices, coupled with congressional guidance on what sentences and considerations promote the SRA's objectives. Over the past two decades, the Commission has continued to collect information about actual sentencing determinations and appellate decisions reviewing those determinations, and has revised the Guidelines accordingly. See *Rita* Br. 22-23.

Third, Congress has played an active role in reviewing and shaping the Guidelines over the years. It provided detailed guidance on the contours of Guidelines when it enacted the SRA, and it has reviewed all of the Guidelines before they have

taken effect. Congress has rejected some Guidelines, directed the Commission to modify others, and has even enacted Guidelines itself. See *Rita* Br. 18. Consequently, the Guidelines currently represent nearly two decades' worth of careful consideration of the appropriate sentences for the various categories of federal offenses and offenders. See *United States* v. *Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005).

The Guidelines are therefore the appropriate benchmark for proportionality review. A sentence that varies substantially from the Guidelines' assessment of the appropriate sentence should prompt an appellate court to seek a substantial justification. That approach permits the courts of appeals to operate from a consistent nationwide starting point so that a drug defendant does not receive inexplicably harsher or more lenient punishment in New York compared to a similarly situated defendant in St. Louis or San Francisco. And it provides the court of appeals with a detailed means of assessing whether the reasoning advanced by the district court for its sentence identifies important factors for a sentence far from the norm, or instead rests on only ordinary factors that the vast majority of judges would weigh differently. Such review permits appellate judges in different circuits to apply common standards and reach generally consistent outcomes.

b. Petitioner points out (Br. 24) that the Commission has acknowledged that the Guidelines cannot account for all the facts and circumstances that may be relevant in a particular case. Of course that is true. But it does not undercut the usefulness of the Guidelines as the benchmark for proportionality review. The proportionality principle recognizes that a Guidelines sentence is not the only reasonable one and that a sentence outside the Guidelines range may be justifiable. See, *e.g.*, *United States* v. *Wadena*, 470 F.3d 735, 739-740 (8th Cir. 2006) (applying proportionality principle and concluding that "substantial" downward variance was justified); *United States*

v. *Baker*, 445 F.3d 987, 993 (7th Cir. 2006) (justification for downward variance "was sufficiently proportional to the district court's deviation from the Guidelines"); *United States* v. *Valtierra-Rojas*, 468 F.3d 1235, 1240-1243 (10th Cir. 2006) ("substantial" divergence from Guidelines range was justified); *United States* v. *Moreland*, 437 F.3d 424, 435-437 (4th Cir. 2006) (some downward variance from Guidelines range was reasonable but extent of variance was not justified), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *Jordan*, 435 F.3d 693, 697 (7th Cir.) ("quite compelling reasons" justified "significant upward variance"), cert. denied, 126 S. Ct. 2050 (2006).

Proportionality review also does not displace the sentencing judge's on-the-scene appraisal of the defendant's crime and its circumstances. The discretion of the sentencing judge under *Booker* means that the court is not bound by the Guidelines and that the courts of appeals will respect reasoned judgment in the application of the Section 3553(a) factors. But a wide variance from the advisory Guidelines range raises the question whether the sentencing judge *has* reasonably applied those factors. The proportionality principle allows appellate courts to structure their review in a consistent and rational fashion, rather than leaving them to fashion a common law of sentencing review from whole cloth.[4]

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[4] A number of petitioner's amici (*e.g.*, NACDL Br. 12-21, 21-28; WLF Br. 22-25; Lee Br. 16) contend that the Guidelines do not adequately account for the Section 3553(a) factors and have not actually reduced sentencing disparities. As explained in the government's brief in *Rita* at 16-22, 24-32, the Guidelines do account for the Section 3553(a) factors and have fostered uniformity in sentencing similarly situated offenders. Petitioner's amici (*e.g.*, WLF Br. 10-22, 25-26; NYCDL Br. 9-11, 15; FAMM Br. 15-16) also raise various other criticisms of the Guidelines that the Sentencing Commission's amicus brief shows are without merit. More fundamentally, as this Court recognized in *Booker*, the fact that the Guidelines are not perfect does not form a basis to reject their continued use to advance the goals of the SRA. The usefulness of the Guidelines must be assessed in the context of the available

3. There is no other appropriate benchmark for proportionality review

No measure, other than the Guidelines, provides an appropriate benchmark for proportionality review. See *Buchanan*, 449 F.3d at 738 (Sutton, J., concurring) ("Where else, at any rate, would a court of appeals start in measuring the reasonableness of a sentence?"). In particular, neither the other sentencing factors in Section 3553(a) nor the "parsimony provision" provides a consistent and quantitative standard for assessing the reasonableness of a sentence.

The non-Guidelines factors in Section 3553(a) provide a frame of reference, but they are too qualitative and general to function as the exclusive benchmark for comparing sentences or identifying disparate applications of the factors. The sentencing purposes in Section 3553(a)(2) provide only "broad, open-ended goals" that will be applied differently by different courts. *Koon* v. *United States*, 518 U.S. 81, 108 (1996); see *United States* v. *Davenport*, 445 F.3d 366, 370 (4th Cir. 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The nature of the offense and characteristics of the defendant, 18 U.S.C. 3553(a)(1), and the "kinds of sentences available," 18 U.S.C. 3553(a)(3), are more concrete, but they cannot be translated into a particular sentence unless they are filtered through the broad, open-ended goals in Section 3553(a)(2). Thus, they ultimately provide no more concrete or consistent a benchmark than the purposes of sentencing themselves.

The mandate in 18 U.S.C. 3553(a)(6) "to avoid unwarranted sentencing disparity" likewise does not itself provide a standard by which to judge when unwarranted disparity exists. Nor can any district court singlehandedly reduce the kind

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alternatives. See *Booker*, 543 U.S. at 255-256, 263. And, as explained below, there is no alternative benchmark on which to base effective proportionality review.

of disparity that the SRA seeks to reduce. The SRA is intended to reduce disparity *nationwide*. See *United States* v. *Thurston*, 456 F.3d 211, 216 (1st Cir. 2006), petition for cert. pending, No 06-378 (filed Sept. 14. 2006); *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006). Each district court sees only a limited portion of the sentences imposed even within its own circuit.[5] Each court of appeals has a broader overview of sentences imposed by various courts, but it cannot consider cases nationwide or establish nationwide standards. The Sentencing Commission, in contrast, has the institutional competence to consider sentencing practices on a national basis. The Commission is charged with collecting and analyzing nationwide sentencing data and revising the Guidelines as appropriate. 28 U.S.C. 994(o) and (p): 28 U.S.C. 994(w) (Supp. III 2003); see *Booker*, 543 U.S. at 263-264; *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Indeed, the Commission took nationwide data into account in formulating the Guidelines. *Supplementary Report* 16. Treating the Guidelines as a benchmark—but not a mandate—therefore provides the only reliable mechanism to reduce disparity on a nationwide basis.

Nor does the "parsimony provision" provide an objective benchmark for proportionality review. 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). That provision requires the sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in Section

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[5] Petitioner incorrectly asserts (Br. 44-45 & n.5) that a district court occupies the best position for deciding whether a particular sentence promotes or reduces sentencing disparity. District courts may see many cases that do not come before the courts of appeals, but they have little institutional basis for forming a view on how other district courts sentence similarly situated defendants. Nor do they have a ready way of assessing whether the individualized factors that prompted them to impose an especially harsh or especially lenient sentence even roughly correspond with the approaches of other judges.

3553(a)(2). But it does not provide a concrete or objective measure of a sufficient sentence. Thus, the parsimony provision, like the other sentencing factors in Section 3553(a), provides no more practical a benchmark to assess an outlier sentence than the highly general and potentially conflicting purposes of punishment themselves.

Finally, although it might theoretically be possible for appellate courts to fashion a common law of sentencing review in which certain kinds of sentences for certain kinds of crimes would be deemed unreasonable, there is no conceivable reason to ignore the Guidelines. A common law system of review—if it were even feasible—would require tremendous resources and then suffer the same flaws petitioner and his amici attribute to the Guidelines. The Guidelines, moreover, benefit from the full attention of the Commission and the involvement of Congress. And, of course, the Court in *Booker* emphasized the continuing relevance of the Guidelines. Under the circumstances, it would be irrational to ignore the ready benchmark of the Guidelines in conducting the necessary proportionality review.

4. *The proportionality principle is consistent with the appellate review contemplated by* Booker

Petitioner contends (Br. 38-47) that the proportionality principle is inconsistent with the standard of appellate review contemplated by *Booker*. That is incorrect.

Under the standard used before 2003 to review departures from the Guidelines, a sentence was "reasonable" if "the reasons given by the district court" were "sufficient to justify the magnitude of the departure." *Williams* v. *United States*, 503 U.S. 193, 204 (1992). *Booker* cited the pre-2003 standard of review in describing the "reasonableness" standard it adopted. 543 U.S. at 261. Proportionality review using the Guidelines

as a benchmark is therefore fully consistent with the standard of review adopted in *Booker*.[6]

Petitioner incorrectly contends that the proportionality principle "inappropriately substitutes the appellate court's" judgment "for the district court's evaluation of section 3553(a)'s factors and purposes in particular cases." Pet. Br. 42. Contrary to that contention, the courts of appeals that apply the proportionality principle continue to defer to the district court's institutional advantage in making case-specific determinations about the individuals and cases before it. The courts of appeals review district court findings of fact under the clear-error standard. See, *e.g.*, *United States* v. *Orozco-Vasquez*, 469 F.3d 1101, 1107 (7th Cir. 2006). And the appellate courts understand unreasonableness review to be "deferential," *United States* v. *Rodriguez-Alvarez*, 425 F.3d 1041, 1045 (7th Cir. 2005), petition for cert. pending, No. 05-8615 (filed Jan. 5, 2006), and akin to review for abuse of discretion. See, *e.g.*, *United States* v. *Spears*, 469 F.3d 1166, 1170 (8th Cir. 2006) (en banc); *United States* v. *Reinhart*, 442 F.3d 857, 862 (5th Cir.), cert. denied, 127 S. Ct. 131 (2006).

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[6] The Court noted in *Booker* that a similar reasonableness standard also applied to review of sentences imposed following the revocation of supervised release, and the Court cited several illustrative cases. See 543 U.S. at 262. Petitioner erroneously contends (Br. 18-19, 38-39) that the proportionality principle is inconsistent with those cases. None of those cases rejects a proportionality principle. And given the more limited statutory ranges typically available in cases of supervised release revocations and the narrower focus of those ranges, see Sentencing Guidelines Ch. 7, Pt. A(3)(b) (adopting primarily a "breach of trust" rationale), it is doubtful that those cases could furnish a comprehensive model for the review of all federal sentences, where a single crime carries a wide range and covers a wide array of conduct, offenders, and sentencing purposes. Whether or not a proportionality principle is needed in the review of supervised-release-revocation sentences, it is needed for the review of the thousands of initial federal sentences.

Petitioner also argues that proportionality review "produces absurd results" because it requires a focus "on the arithmetical degree of variation from the Guideline" range. Pet. Br. 39. Contrary to that contention, nothing about the proportionality principle requires a single-minded focus on the percentage by which the sentence imposed deviates from the applicable Guidelines range. Courts of appeals can and do apply the proportionality principle without turning "the reasonableness inquiry into a numbers game that relies only on a numerical or percentage line for reductions." *United States* v. *Wallace*, 458 F.3d 606, 613 (7th Cir. 2006). Instead, appellate courts should assess the extent of the variance from the Guidelines by considering all the relevant measures—percentage, absolute time, and any difference in the nature of the punishment (*e.g.*, probation in lieu of imprisonment).[7]

5. *Appellate review without a proportionality principle threatens to endorse the virtually unbounded district court discretion characteristic of the pre-SRA regime*

Neither petitioner nor his amici offer any alternative form of appellate review that accords with the role envisioned by *Booker*. Petitioner, for his part, offers little explanation of how courts of appeals should review out-of-Guidelines sentences for unreasonableness. To the extent that petitioner says anything about how unreasonableness review should work, his comments suggest that it should not include any substantive component at all. Petitioner describes as a "false premise" the idea that "this Court intended 'reasonableness' review to limit the range of choice available to judges considering section 3553(a)." Pet. Br. 9. And he asserts that courts of appeals are

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[7] See, *e.g.*, *United States* v. *Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) (noting inappropriateness of exclusive focus on percentage); *Valtierra-Rojas*, 468 F.3d at 1240 (noting that "there are no strict guideposts that invoke certain levels of scrutiny" and considering "*both* percentage *and* absolute time").

prohibited from disagreeing with the "the weight sentencing judges gave to, or withheld from, particular factors." *Id.* at 33. See also *id.* at 11 (arguing that his sentence was reasonable because the district court "considered the relevant facts directed by section 3553(a) and imposed a sentence that, in its view, was 'sufficient but not greater than necessary' to satisfy the statutory purposes of sentencing."). That is not appellate review but its abdication. The courts of appeals cannot effectively carry out this Court's directive to "determin[e] whether [the] sentence 'is unreasonable, having regard for . . . the [Section 3553(a)] factors * * * and . . . the reasons for the imposition of the particular sentence, as stated by the district court," *Booker*, 543 U.S. at 261, without evaluating the weight that district courts have given the various Section 3553(a) factors. And appellate review cannot "iron out sentencing differences," *id.* at 263, if it imposes no limit on the range of sentences that district courts may impose in a particular case.

Petitioner's amicus FAMM acknowledges (albeit grudgingly) that unreasonableness review "is not without a substantive component." FAMM Br. 27. But the substantive review proposed by FAMM will not be any more effective in reducing unwarranted sentencing disparity than petitioner's alternative of no substantive review at all. FAMM contends that a sentence should be upheld unless it is "arbitrary and capricious and manifestly irrational" or it "runs afoul of the principle of parsimony," which, according to FAMM, requires the district court to impose "the least burdensome punishment" that satisfies the purposes of punishment set out in Section 3553(a)(2). *Id.* at 27-28. If FAMM's proposal provided any content for appellate review, it would provide only a one-way ratchet downward, and thus it could not guard against disparities that result from excessively lenient sentences. But FAMM's approach does not provide any meaningful content for review. In the first place, it relies on a misreading of the intent and force

of the so-called parsimony provision. See *Rita* Br. 27-28. In any event, review for arbitrariness, capriciousness, and irrationality cannot assure that sentences are reasonably proportionate and not a source of unwarranted disparity unless the reviewing courts have a quantitative benchmark by which to compare sentences. And, as described above, neither the purposes of punishment directly nor those purposes filtered through the parsimony principle provide such a benchmark. FAMM's proposal, like petitioner's, will thus result in the same kind of unchecked sentencing discretion that existed in the pre-Guidelines sentencing regime and that caused the "shameful disparity in criminal sentences" that Congress sought to eliminate when it enacted the SRA. S. Rep. 98-225, at 65.

Indeed, *Booker*'s remedy of advisory Guidelines with appellate review critically rested on the conclusion that those features will "continue to move sentencing in Congress' preferred direction" of greater uniformity. 543 U.S. at 264. Rejection of a proportionality principle for appellate review would seriously undermine that conclusion. Not only would it significantly diminish the ability of appellate courts to "iron out sentencing differences," *id.* at 263, but it would also contradict the remedial opinion's central premise.

D. Proportionality Review Is Consistent With The SRA As Modified By *Booker*

The proportionality principle best comports with the provisions of the SRA left intact by *Booker* and promotes Congress's underlying purpose. Indeed, the remaining portions of the SRA are, if anything, supportive of the adoption of proportionality review.

1. Proportionality review is consistent with Section 3553(a)

Proportionality review, using the Guidelines as a benchmark, is consistent with the text of Section 3553(a). Nothing

in Section 3553(a) precludes appellate courts from drawing on the Guidelines and notions of proportionality to structure the review of sentences. Although Section 3553(a) itself does not establish a hierarchy of factors, it enumerates the central principle of the SRA—disparity avoidance—as a consideration in sentencing, 18 U.S.C. 3553(a)(6). Appellate courts can reasonably adopt a principle of proportionality as the means of implementing that statutory consideration, since no other standard would serve that purpose. Moreover, Section 3553(a) requires consideration of the Guidelines, 18 U.S.C. 3553(a)(2), which is also consistent with the proportionality principle.

Petitioner contends (Br. 41-42) that Section 3553(a) simply lists seven factors and provides no priority for any of them; it follows, he asserts, that district courts enjoy almost plenary authority to decide how the statutory purposes apply to the facts of any particular case. But that suggestion overlooks that appellate review for reasonableness must mean more than simply a rough check that a district court has consulted the statutory factors. That approach would fail to move sentencing towards the uniformity that Congress desired—the very premise of upholding the severability remedy in *Booker*. 543 U.S. at 264.

2. *Proportionality review is consistent with the parsimony provision*

Amicus NYCDL contends (Br. 9) that "[r]equiring any special showing or some form of 'extraordinary circumstances' to justify a sentence below the advisory guidelines * * * conflicts with the parsimony provision that Section 3353(a) sets forth as a district court's guiding directive." But a proportionality principle reinforces the import of that provision. A sentence must be "sufficient" to achieve the purposes of punishment as well as not excessive. 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). The provision thus posits that some sentences will

fail to provide adequate punishment for particular offenders, while other sentences may be too great. Identifying the appropriate range of sentences that fit the purposes of punishment is inherently a task of proportioning the sentence to the crime and the offender. Moreover, like FAMM, NYCDL misconstrues the parsimony provision as a direction to be lenient, when, in fact, it directs that the sentence imposed be consistent with, *i.e.*, proportionate to, the general purposes of sentencing in Section 3353(a)(2). See *Rita* Br. 27-28.

3. Proportionality review is supported by 18 U.S.C. 3553(c)

Proportionality review is also consistent with, and indeed supported by, the requirement that judges provide reasons for their sentences under 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). Section 3553(c) requires district courts to state reasons supporting the sentences that they impose, and Section 3553(c)(2) requires a district court to provide more specific reasons for a sentence that is outside the Guidelines range. For a non-Guidelines sentence, the court must state "the specific reason for the imposition of a sentence different from" the Guidelines recommendation, and the reason must generally be "stated with specificity in the written order of judgment and commitment." 18 U.S.C. 3553(c)(2) (Supp. IV 2004). Notably, this Court did not excise that provision in *Booker*. See 543 U.S. at 260.

Section 3553(c)(2) is clearly directed towards facilitating appellate review. See S. Rep. 98-225, at 80 ("The statement of reasons will play an important role in the evaluation of the reasonableness of the sentence. In fact, if the sentencing judge fails to give specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement."). The requirement in Section 3553(c)(2) that the district court ex-

plain why the sentence is different from the advisory Guidelines sentence supports use of the Guidelines as the benchmark in judging the reasonableness of sentences that vary widely from the range. The Guidelines provide national standards that judges must "consult" and "take * * * into account when sentencing" (*Booker*, 543 U.S. at 264), and the requirement of reasons for non-Guidelines sentences logically supports an approach that treats substantial variances from the Guidelines as requiring correspondingly persuasive justifications. Section 3553(c)(2) thus provides practical and legal support for the proportionality principle.

E. Proportionality Review Is Consistent With The Sixth Amendment

1. The proportionality principle does not violate the Sixth Amendment because it does not require the sentencing judge to find a fact to sentence outside the advisory Guidelines range

Although proportionality review asks for an especially strong justification for a sentence that varies widely from the advisory Guidelines range, it does not impose any limitation on the facts on which the sentencing judge may rely for that justification. In particular, the principle does not preclude the judge from justifying an out-of-Guidelines sentence based on facts already considered by the Guidelines, including the facts reflected in the jury verdict. Because the proportionality principle does not require the judge to rely on facts other than those reflected in the jury verdict before imposing a sentence outside of the Guidelines range, the proportionality principle does not violate the Sixth Amendment.

a. As *Booker* reiterated, the Sixth Amendment is not implicated when a judge exercises discretion "in imposing a sentence within a statutory range." 543 U.S. at 233 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000), and *Wil-*

liams v. *New York*, 337 U.S. 241, 246 (1949)). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Ibid.* The Sixth Amendment is violated, however, if a judge may lawfully sentence outside a specified sentencing range only if the judge finds a fact other than the "facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted).

Thus, a guidelines system presents a Sixth Amendment problem only when it mandates some range, lower than the maximum for an offense specified by statute, that the judge may not lawfully exceed without finding a fact in addition to the facts reflected in the jury verdict or admitted by the defendant. The SRA as it existed before *Booker* presented that Sixth Amendment problem. A sentencing judge could not even calculate the appropriate Guidelines range based on only the facts found by the jury, and because the Guidelines were mandatory, the judge could not deviate from the Guidelines range unless the judge found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b)(1) (Supp. IV 2004). Making that determination necessarily involved finding a fact beyond those reflected in the jury verdict. The SRA's mandatory Guidelines system was therefore not consistent with the Sixth Amendment. See *Booker*, 543 U.S. at 234-235.

In order to render the SRA constitutional, *Booker* made the Guidelines non-mandatory by excising Section 3553(b)(1)'s limitation on the district court's authority to sentence outside the Guidelines range. 543 U.S. at 259. The proportionality principle does not reinstate that limitation; nor does it impose any other limitation on the facts on which a sentencing judge may rely to sentence outside the Guidelines range. As long as

the judge provides a sufficiently persuasive justification, the judge may sentence all the way to the statutory maximum in the United States Code. And the judge may rely on any facts, including facts already reflected in the jury verdict, to justify that out-of-Guidelines sentence.

b. Of course, reasonableness review means that a sentence at the statutory maximum will not be available in every case. Indeed, a sentence at the statutory maximum may not be reasonable in a significant number of cases. But that is not problematic. When Congress enacts a broad sentencing range, it necessarily contemplates punishment alternatives for the full spectrum of violators under the provision. A sentencing judge is expected, in his discretion, to reserve the harshest punishment for the most culpable offenders, and the most lenient punishment for the least culpable. Imposition of the most severe sentence on all defendants would conflict with the provision for a range.

Even before the SRA, while appellate courts did not review sentences for abuse of discretion, see *Koon*, 518 U.S. at 96, they did reverse maximum sentences when the sentencing judge failed to exercise discretion in light of the circumstances of the individual offender, but instead imposed sentence based solely on the offense of conviction.[8] Those courts recognized

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[8] See, *e.g.*, *United States* v. *Wardlaw*, 576 F.2d 932, 938-939 (1st Cir. 1978) (district court may not sentence based on "mechanistic" view that a particular crime always deserves a particular punishment; while general deterrence is a permissible factor, the individual circumstances of the defendant must be taken into account (citation omitted)); *United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974) (per curiam) ("the court applied a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis," which "requires us to invalidate the sentence"); *United States* v. *Bowser*, 497 F.2d 1017, 1019 (4th Cir. 1974) (vacating sentencing where court imposed the maximum sentence for bank robbery of 25 years of imprisonment where circumstances suggested that there may not have been an "actual exercise of discretion"), cert. denied, 419

that, when Congress establishes a punishment range, it intends courts to take into account individualized circumstances rather than routinely to impose the maximum sentence.[9] Nothing in that principle raised any Sixth Amendment concern, and a proportionality principle that has the same consequence is therefore equally consistent with the Sixth Amendment. Such a consequence is, in fact, inherent in review for reasonableness.

2. *The proportionality principle does not reinstate mandatory Guidelines*

Petitioner (Br. 34-37, 46-47), echoed by various amici (Sentencing Project Br. 2, 5-6; WLF Br. 9; FAMM Br. 21-22), contends that the proportionality principle violates the Sixth

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U.S. 857 (1974); *United States* v. *Daniels*, 446 F.2d 967, 971 (6th Cir. 1971) (reversal permitted when district court "grossly abused his discretion by failing to evaluate the relevant information before him with due regard for the factors appropriate to sentencing"; "[a] trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of 'individualizing sentences'" (quoting *Williams* v. *New York*, 337 U.S. at 248)); *Woosley* v. *United States*, 478 F.2d 139, 143 (8th Cir. 1973) (review permitted if sentence was "shown to have been imposed on a mechanical basis," which conflicts with *Williams* v. *New York*, *supra*); *United States* v. *Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985) (imposition of maximum term without individualizing sentences was an abuse of discretion; "mechanized sentencing" based on "the category of the crime, rather than the culpability of each individual criminal," is improper); *United States* v. *Roper*, 681 F.2d 1354, 1361 (11th Cir. 1982)) (disapproving of "rigid and mechanical sentencing procedures by which the district court bypasses the defendant's individual circumstances and metes out a sentence based on the category of crime"); *United States* v. *McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970) (per curiam) (Stated policy of sentencing anyone convicted by a jury of armed robbery to a life sentence "completely undermines the basis on which trial judges have been accorded wide latitude in exercising discretion in determining sentences * * *. [A] rigid policy based solely on the crime with which the defendant is charged is not an exercise of discretion.")

[9] *Barker*, 771 F.2d at 1367; *Daniels*, 446 F.2d at 971-972.

Amendment because it effectively reinstates a mandatory Guidelines system. That contention is incorrect.

As an initial matter, petitioner's argument is based on the mistaken premise that the proportionality principle "requir[es] extraordinary circumstances to sentence below the Guidelines." Pet. Br. 35; see *id.* at 34 (asserting that principle "[r]equir[es] 'extraordinary justification' as a threshold for non-Guidelines sentences" and "extraordinary justifications for downward 'variances'"). Contrary to that premise, no court of appeals has held that a district court must provide an "extraordinary justification" before it may sentence outside the Guidelines range. Indeed, the courts of appeals have rejected that proposition. See, *e.g.*, *United States* v. *Rivera*, 448 F.3d 82, 85 (1st Cir. 2006) (a "party need not make an 'extraordinary' showing in order to persuade the district court that a sentence below the [Guidelines range] is warranted").

Consequently, petitioner and his amici are incorrect in contending that the proportionality principle requires district courts "to select a Guidelines-range sentence in the vast majority of cases." Sentencing Project Br. 2. Nothing in the proportionality principle presumes that a non-Guidelines sentence is unreasonable. Instead, the proportionality principle has its primary force when a court of appeals reviews a sentence significantly outside the range. Because the principle addresses only the extent of variance that can be justified, it does not require district courts to impose a within-Guidelines sentence in any, let alone the vast majority of, cases. See, *e.g.*, *Valtierra-Rojas*, 468 F.3d at 1238-1239 (10th Cir.) (citing cases from the Fourth, Sixth, Seventh, and Eighth Circuits—all of which have adopted the proportionality principle—holding that there is no presumption that a sentence outside the Guidelines range is unreasonable).

Petitioner incorrectly asserts that the proportionality principle "does little more than echo the standards for downward

departures" (Br. 34) and that "the prior departure standards may have allowed greater discretion" (Br. 35). The proportionality principle bears no resemblance to the circumscribed departure system under the mandatory Guidelines. Most fundamentally, as discussed above, the proportionality principle does not restrict out-of-Guidelines sentences to situations where the district court finds a fact or circumstance not adequately taken into account by the Guidelines. Moreover, unlike the departure provisions of the Guidelines, see Sentencing Guidelines §§ 5H1.1-7, 11-12, 5K2.0(d), 12-13, 19-20, the proportionality principle does not prohibit or discourage sentencing outside the Guidelines range based on particular facts. On the contrary, the proportionality principle places no limit on the universe of facts that can justify an out-of-Guidelines sentence.

3. The proportionality principle does not otherwise unconstitutionally constrain district court sentencing discretion

Amicus NYCDL incorrectly contends that the proportionality principle raises constitutional issues because it "strongly discourage[s] district courts from exercising the sentencing discretion that this Court deemed constitutionally essential in *Booker*." NYCDL Br. 4. The contention lacks support.

The percentage of out-of-Guidelines sentences has increased significantly since *Booker* in virtually all circuits, including all but one that have adopted the proportionality principle. In the four fiscal years before this Court's decision in *Blakely*, available statistics indicate that district courts imposed out-of-Guidelines sentences on grounds other than government-sponsored departure in 9.4% of the cases.[10] See

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[10] Those statistics may well overstate the rate of non-government sponsored departures. Government sponsorship may not be perfectly reflected in the figures, particularly for circuits that handled a large volume of immigration

App., *infra*, 32a. Between February 1, 2005 (a few weeks after *Booker* was decided), and September 30, 2006 (the latest date for which preliminary data have been released), district courts imposed such out-of-Guidelines sentences in 13.9% of the cases. *Ibid.* That represents a 48.4% increase in the rate of out-of-Guidelines sentences. Moreover, non-Guidelines sentences have, on average, increased at a greater rate in the circuits that have adopted the proportionality principle than in the circuits that have not adopted the principle. *Ibid.* The rate of increase is 67.2% in proportionality circuits and only 29.6% in circuits that have not adopted the principle. *Ibid.* Thus, there is no basis to conclude that the proportionality principle discourages out-of-Guidelines sentences.

Petitioner (Br. 29) and NYCDL (Br. 3-8) also contend that the proportionality principle leads courts of appeals to invalidate most below-Guidelines sentences and to affirm most above-Guidelines sentences. That claim has no logical basis because the proportionality principle applies equally to sentences whether they are above or below the Guidelines range. See, *e.g.*, *Dean*, 414 F.3d at 729 ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer to enable the court of appeals to assess the reasonableness of the sentence imposed.").[11]

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cases (*e.g.*, the Fifth and the Ninth). It is also clear that, in virtually all circuits, departure rates dropped significantly in the years immediately before *Booker*—when the PROTECT Act was in effect—and rose significantly after *Booker*.

[11] Although petitioner asserts (Br. 29) that the Eighth Circuit does not apply the proportionality principle in deciding appeals of above-Guidelines sentences, that is incorrect. See, *e.g.*, *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006).

The difference in the rates of affirmance for below- and above-Guidelines sentences stems from other factors that suggest no cause for concern. Upward variances are far rarer than downward ones. See United States Sentencing Comm'n, *Final Report on the Impact of* United States *v.* Booker *on Federal Sentencing* D-4 (2006); App., *infra*, 32a. And the government appeals a small percentage of sentences on the ground of unreasonableness, while criminal defendants appeal a high percentage (likely including nearly all upward variances). Both the FPCD and the NYCDL report more than 17 times as many defendant appeals as government appeals, see FPCD Br. App. A8; NYCDL Br. App. 2a-3a, 5a-6a, despite the fact that, since *Booker*, district courts have imposed below-Guidelines sentences more than seven times as often as above-Guidelines sentences, see App., *infra*, 32a. Indeed, FPCD figures show that defendants are nearly twice as likely to appeal even when the district court imposes a sentence *below* the Guidelines range. FPCD Br. App. 8a (counting 148 defendant appeals and 83 government appeals from below-Guidelines sentences). See also *United States* v. *McDonald*, 461 F.3d 948, 956 n.7 (8th Cir. 2006). Given the government's greater selectivity in appealing, it is unsurprising that appellate courts have reversed below-range sentences more frequently.

Finally, amicus NACDL contends that the proportionality standard violates the Sixth Amendment because, "[i]n the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present," the standard requires "a sentence greater than that authorized by the jury's findings." NACDL Br. 4. That argument depends on the mistaken premise that the maximum sentence "authorized by the jury's findings" is the top of the Guidelines range as calculated based on those findings. See *id.* at 8 (suggesting that the maximum sentence authorized by the jury's findings is "the top of the range determined solely on the basis of facts found by the jury or admitted

by the defendant"). That premise would be correct only if a sentencing judge were prohibited from sentencing above that range unless the judge found a fact beyond the facts reflected in the jury verdict. See *Blakely*, 542 U.S. at 303 (defining statutory maximum for *Apprendi* purposes). But *Booker* eliminated that prohibition, and the proportionality principle does not reimpose it. Consequently, the maximum sentence "authorized by the jury's findings" is not the top of the Guidelines range as calculated based on the facts found by the jury but the statutory maximum provided in the United States Code. Indeed, that conclusion follows from the advisory nature of the Guidelines after *Booker*, which makes reference to the Guidelines range as calculated based on the jury's findings unnecessary and artificial.

II. PETITIONER'S SENTENCE WAS UNREASONABLE

Petitioner's advisory Guidelines range was 37 to 46 months of imprisonment. J.A. 53-63, 69; Sealed J.A. 15. The district court imposed a sentence of 15 months. J.A. 72, 78; Sealed J.A. 17. The sentence was therefore 22 months, and nearly 60%, below the bottom of the Guidelines range. That was a substantial variance, and thus, under the proportionality principle, it required a substantial justification. The justification provided by the district court does not satisfy that requirement. The 15-month sentence was therefore unreasonable.

A. The Circumstances On Which The District Court Relied Cannot Justify Such A Substantial Variance From The Guidelines Range

As justification for its sentence, the district court identified five considerations: (1) the fact that petitioner's criminal history "is zero," J.A. 71; accord J.A. 72; Sealed J.A. 17; (2) "the quantity of drugs involved," J.A. 72; accord Sealed J.A. 17; (3) the fact that petitioner "qualif[ies] for the safety valve," J.A. 72; (4) "the likelihood of [petitioner's] committing further

similar crimes in the future," *ibid.*; and (5) a comparison of petitioner's "situation" to "that of other individuals that I have seen in this court who have committed similar crimes," *ibid.*; accord Sealed J.A. 17.

1. The first three considerations on which the district court relied are common features of drug cases that present no especially weighty grounds for a variance. Indeed, the Guidelines range was considerably reduced for those very factors.[12] The fact that the Guidelines range reflected those factors does not bar a district court from relying on them in determining whether the factors in Section 3553(a) justified a below-Guidelines sentence. As a number of courts have recognized, however, it does mean that the circumstances can support a very substantial variance from the Guidelines range only if they substantially distinguish petitioner from the hundreds of other defendants who share the same general characteristics.[13]

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[12] Petitioner's lack of a criminal record placed him in the lowest criminal history category (category I), Sentencing Guidelines Ch. 5, Pt. A (Sentencing Table), and was one of the criteria that made him eligible for the "safety valve," *id.* § 5C1.2(a)(1). The quantity of drugs for which petitioner was held responsible (between 5 and 20 grams of cocaine base) determined his base offense level (level 26). *Id.* § 2D1.1(a)(3) and (c)(7). And petitioner's eligibility for the "safety valve" reduced his offense level by two levels, *id.* § 2D1.1(b)(9), and authorized the district court to impose a sentence below the five-year statutory minimum, 18 U.S.C. 3553(f).

[13] See, *e.g.*, *Bishop*, 469 F.3d at 907 ("an extreme variance must be justified by § 3553(a) factors that are particular and individualized, not those that may be common to many defendants"); *Rattoballi*, 452 F.3d at 133-134 ("[O]n appellate review, we will view as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants. Disparate sentences prompted the passage of the Sentencing Reform Act and remain its principal concern."); *United States* v. *Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) ("When a factor is already included in the calculation of the guidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that

The district court's explanation did not identify reasons why this case involved distinctive features that justified the variance. Indeed, insofar as petitioner's advisory Guidelines range was based on his lack of a criminal record and his responsibility for a little more than five grams of crack, the advisory Guidelines range likely *understated* petitioner's culpability. To establish eligibility for a sentence below the statutory minimum of five years, petitioner had to "truthfully provide[] to the Government all information and evidence [he] has concerning the offense or offenses that were part of the same course of conduct." 18 U.S.C. 3553(f)(5). Petitioner made the following admission, through counsel, before sentencing:

> [Petitioner] sold crack in the area of 37th and Itaska in the City of St. Louis for approximately two and a half months between either the end of February, 2003, or early March, 2003, until his May 14, 2003 arrest. He was there from about 9:00 p.m. to midnight or 1:00 a.m., almost every day. Often he was unable to sell anything because there were a large number of individuals selling in that area. * * * He obtained his crack from a man named Shawn * * * . Claiborne would call Shawn, who would deliver the crack to him. He could obtain five or six rocks from Shawn for $50.00. He would try to sell each rock for $20.00.

J.A. 50.

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this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation."); *United States* v. *Myers*, 439 F.3d 415, 418 (8th Cir. 2006) ("[The defendant's] lack of a criminal history, while reflected in the advisory sentencing guidelines, was properly considered as part of 'the history and characteristics of the defendant.' * * * Inasmuch as a guidelines sentence reflects a defendant's criminal history, [however,] a wide divergence from the guidelines sentence based solely on this single criterion would conflict with the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.") (quoting 18 U.S.C. 3553(a)(1), and citing 18 U.S.C. 3553(a)(6)).

Petitioner's May 14, 2003, arrest, at the end of that approximately two-and-a-half-month period, was for the sale of crack to an undercover detective in the same area. J.A. 14, 50, 88-89; Sealed J.A. 4. Petitioner was initially charged with a state drug offense and referred to a drug-court program, in connection with a deferred prosecution. Sealed J.A. 6. On November 2, 2003, while subject to the diversion program, petitioner was arrested again, in possession of more than 5 grams of crack. J.A. 14-15, 50-51, 89; Sealed J.A. 4-5. In federal court, petitioner was charged with, and pleaded guilty to, only the May 14 and November 2 crimes, and he was held responsible at sentencing only for the crack that was seized from him on those two dates. J.A. 1-2, 7-9, 14-15; Sealed J.A. 3, 5.

The undisputed evidence thus demonstrates that petitioner sold crack continually for more than two months before his May 14 arrest and possessed a large quantity of crack less than six months after that arrest (and subsequent referral to the drug-court program). That evidence reflects that petitioner can be considered a "first-time offender" only in a formal sense (because he has no prior convictions) and that he is, as a practical matter, a repeat offender. The evidence also reflects that petitioner sold a far larger quantity of crack than that for which he was held responsible. As a consequence, insofar as there are any differences between petitioner and typical crack defendants with the same offense level and criminal-history score, the differences do not warrant a less severe sentence for petitioner; if anything, they warrant a more severe sentence. The district court's reliance on the drug quantity and criminal history score in varying downward very substantially from the Guidelines range was therefore plainly unjustified.[14]

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[14] The court of appeals believed it a "fair inference" that petitioner distributed additional quantities of crack between the dates of his two arrests. J.A. 91. That inference may well be warranted. Even if it is not, however, or even

For the same reasons, the fourth consideration on which the district court relied—"the likelihood of [petitioner's] committing further similar crimes in the future," J.A. 72—cannot justify a substantial variance from the advisory Guidelines range, as the court of appeals correctly held (J.A. 91). The district court believed that petitioner was sufficiently unlikely to return to selling crack that a 15-month prison term—an extremely lenient sentence for a crack offense—would constitute adequate deterrence. But that belief cannot be reconciled with the undisputed fact that petitioner sold crack continually for more than two months until he was caught and placed in a diversion program, and then, less than six months later, "committed a second serious drug offense" while still subject to the program, J.A. 91. Plainly, petitioner's continued drug dealing even after being arrested and offered leniency in state court revealed that the need for a deterrent sentence was increased, not decreased.

2. The district court's fifth stated ground for the variance was that, "when I compare [petitioner's] situation to that of other individuals that I have seen in this court who have committed similar crimes * * * and the sentences they receive, I don't believe that 37 months is commensurate in any way with that." J.A. 72. But the court did not identify any of those "other individuals"; it did not describe the "similar crimes" they had committed; and it did not state what "sentences they [had] receive[d]." It is thus impossible for a reviewing court to make a reasoned assessment of whether similar sentences were justifiably imposed on similarly situated defendants.

More fundamentally, a national sentencing system does not contemplate that each district judge will create a personal set

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if the court of appeals was not the appropriate court to draw it (Pet. Br. 42-43), the circumstances described above are sufficient by themselves to justify the conclusion that the advisory Guidelines range does not overstate, and likely understates, petitioner's culpability.

of guidelines and then seek to avoid disparities within the comparatively small set of cases that end up on that judge's docket. "Congress' primary goal in enacting § 3553(a)(6) was to promote national uniformity in sentencing," not uniformity in a particular case or within a particular court. *United States* v. *Parker*, 462 F.3d 273, 277 (3d Cir.) (emphasis added), cert. denied, 127 S. Ct. 462 (2006); see pp. 25-26, *supra*. The large majority of defendants throughout the country who are similarly situated to petitioner will likely receive a sentence within or near the advisory Guidelines range of 37 to 46 months. Petitioner's variance thus had the effect of increasing, not reducing, disparity in the sentencing of similarly situated defendants across the country, based largely on the sentencing perceptions of the individual judge.

B. No Other Circumstances In The Record Could Justify Such A Substantial Variance

1. In defending the 15-month sentence as reasonable, petitioner relies (Br. 16, 22) on the district court's statement that a sentence within the Guidelines range "would be tantamount to throwing [him] away." J.A. 72. But that statement merely reflects the court's conclusion that a Guidelines sentence would be too long; it does not provide any additional explanation of what facts and circumstances justify that conclusion. Indeed, in using the language on which petitioner relies, the court made clear that it was relying on the first four of the five considerations discussed above—*i.e.*, petitioner's lack of criminal history, the quantity of drugs, petitioner's eligibility for the "safety valve," and the likelihood of recidivism. See *ibid.* ("when I consider" those factors, "I come to the conclusion that a 37-month sentence would be tantamount to throwing you away").

Petitioner contends that the comments "reflect the district court's judgment that just punishment and the need to protect

the public from future crimes meant, in [petitioner's] case, a sentence that punished without severing his family connections." Br. 16. On this view, the district court "did not wish to throw away [petitioner's] chance to be a father, to reintegrate with his family, and to resume his family responsibilities." *Ibid.* That contention is mistaken, because the district court never identified petitioner's family ties and responsibilities as a basis for the variance. See J.A. 71-72; Sealed J.A. 17. Insofar as the court mentioned petitioner's family, it was in the context of "lecturing" him (J.A. 71) that "[s]elling drugs is * * * not the way to support your family," that "[y]ou're not going to be able to support your family from prison," and that "you [might not] fully realize the effect of what you've done has on your family." J.A. 70. In any event, an effect on family ties is a common consequence of imprisonment. Nothing in the record indicates that petitioner's family ties and circumstances differ from those of a large percentage of defendants.

Petitioner also suggests that the variance was justified by his history of employment, including at the time of sentencing. Br. 14. What is true of petitioner's family ties and responsibilities, however, is equally true of his employment record: the district court did not identify it as a ground for the variance (indeed, the court did not mention it at all), see J.A. 69-74; Sealed J.A. 17; and it is in any event a circumstance that is common to a large proportion of defendants.

Finally, petitioner notes that the district court "recognized [his] youth" when it imposed sentence. Br. 16. The court did not say, however, that petitioner's youth was a basis for a variance. See J.A. 71-72; Sealed J.A. 17. Indeed, far from having identified it as a mitigating factor, the court's comments about petitioner's youth were made in the context of expressing concern that petitioner would commit additional crimes in the future. See J.A. 70 ("I am very concerned that, because you're so young, you don't fully realize the effect of what you've done

has on your family and what it is going to have on you and your future."). That concern was certainly justified, because there is a strong correlation between youth and recidivism. See, *e.g.*, United States Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12, 28 (2004).

2. One of petitioner's amici suggests that a substantial variance was warranted because "Criminal History Category I overstates the criminal tendencies and likelihood of recidivism for a true first-time offender like [petitioner]." NYCDL Br. 10. But because petitioner sold crack continually for more than two months before his first arrest and committed another crack offense less than six months afterwards, petitioner is not a "true" first-time offender. And although he may be a "first-time offender" in the sense that he has no prior convictions, the fact that he committed the second crime a few months after his arrest on the first crime, while participating in the drug court's diversion program, places him in the category of first offenders who are most likely to be recidivists. See United States Sentencing Comm'n, *Recidivism and the "First Offender"* 14-16 (2004).

A number of petitioner's amici also suggest that the variance was warranted because of the disparity in Guidelines sentences for crack cocaine and powder cocaine. NYCDL Br. 10-11; Sentencing Project Br. 7-18. As one set of amici acknowledges, however, "the district court did not base the sentence it imposed on this disparity." Sentencing Project Br. 8. Consequently, the issue was not addressed by the court of appeals, and the question whether a court may base its sentencing decision on a general disagreement with Congress's decision to impose harsher punishment for crimes involving crack than for those involving powder is not presented in this case. In any event, as the courts of appeals have uniformly concluded, such a categorical disagreement with the congres-

sionally prescribed crack-powder ratio is not a permissible basis for a variance.[15]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2007

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[15] See *Spears*, 469 F.3d at 1170-1178; *United States* v. *Castillo*, 460 F.3d 337, 355-361 (2d Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 685-688 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006); *United States* v. *Williams*, 456 F.3d 1353, 1364-1369 (11th Cir. 2006), petition for cert. pending, No. 06-7352 (filed Oct. 19, 2006); *United States* v. *Eura*, 440 F.3d 625, 632-634 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006); *United States* v. *Pho*, 433 F.3d 53, 61-65 (1st Cir. 2006); cf. *United States* v. *Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("[A]though the issue is not before us, we do not suggest (or even hint) that the [District] Court [may] categorically reject the 100:1 ratio and substitute its own, as this is *verboten*.").

APPENDIX

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 3553 of Title 18 (2000 & Supp. IV 2004) provides:

> **Imposition of a sentence**
>
> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy

statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In General—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

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[1] So in original. The period probably should be a semicolon.

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses—

(A)[2] **Sentencing**—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

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[2] So in original. No subpar. (B) has been enacted.

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court

shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the courts statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

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[3] So in original. The second comma probably should not appear.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendants substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

3. Section 3742 of Title 18 (2000 & Supp. IV 2004) provides:

Review of a sentence

(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or

includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant

to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. Section 991 of Title 28 (2000 & Supp. IV 2004) provides:

United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the

same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney Generals designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sen-

tencing as set forth in section 3553(a)(2) of title 18, United States Code.

5. Section 994 of Title 28 (2000 & Supp. IV 2004) provides:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

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[1] So in original. Probably should be "incidence."

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[2] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

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[2] So in original. Probably should be "incidence."

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the

defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(*l*) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commis-

sion of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(*o*) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United

States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 9/30/2006	
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**114,318**	
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	14,059	12.3%
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**812**	
Below-Range Sentences	22	8.5%	24	5.8%	21	4.4%	20	4.9%	87	5.6%	111	13.7%
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**2,568**	
Below-Range Sentences	145	9.8%	158	8.7%	143	7.8%	66	5.2%	512	8.0%	421	16.4%
Second Circuit	**3,926**		**4,077**		**4,783**		**3,426**		**16,192**		**7,301**	
Below-Range Sentences	683	17.4%	692	17.0%	764	16.0%	465	13.6%	2,604	16.1%	1,768	24.2%
Third Circuit	**2,561**		**2,858**		**2,783**		**2,086**		**10,088**		**5,128**	
Below-Range Sentences	201	7.8%	194	7.3%	206	7.4%	115	5.5%	716	7.1%	859	16.8%
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**10,333**	
Below-Range Sentences	228	4.8%	197	3.9%	216	3.8%	128	3.1%	769	3.9%	1,125	10.9%
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**25,506**	
Below-Range Sentences	1,563	14.0%	1,360	11.1%	999	7.5%	361	3.7%	4,283	9.2%	1,952	7.7%
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**8,518**	
Below-Range Sentences	261	6.2%	240	5.4%	256	5.3%	175	5.1%	932	5.5%	1,245	14.6%
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**5,008**	
Below-Range Sentences	139	5.8%	180	6.7%	136	4.5%	82	3.7%	537	5.2%	740	14.8%
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**8,214**	
Below-Range Sentences	319	9.2%	335	9.4%	308	7.1%	165	4.7%	1,127	7.6%	1,166	14.2%
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**20,658**	
Below-Range Sentences	1,944	16.3%	2,016	17.2%	1,311	9.9%	596	6.4%	5,867	12.7%	2,557	12.4%
Tenth Circuit	**2,980**		**3,833**		**4,478**		**3,728**		**15,017**		**9,548**	
Below-Range Sentences	230	7.7%	286	7.5%	246	5.5%	165	4.4%	927	6.2%	1,008	10.6%
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**10,724**	
Below-Range Sentences	392	6.6%	372	6.0%	290	4.5%	160	3.3%	1,214	5.2%	1,107	10.3%
Presumption Circuits	**29,247**		**32,182**		**36,108**		**27,281**		**124,818**		**67,939**	
Below-Range Sentences	2,762	9.4%	2,622	8.1%	2,182	6.0%	1,096	4.0%	8,662	6.9%	7,347	10.8%
Other Circuits	**25,842**		**26,502**		**29,063**		**20,970**		**102,377**		**48,379**	
Below-Range Sentences	3,365	13.0%	3,432	12.9%	2,714	9.3%	1,402	6.7%	10,913	10.7%	6,712	14.5%
Comparison												
Difference in Rates		**+3.6%**		**+4.8%**		**+3.3%**		**+2.7%**		**+3.7%**		**+3.7%**
% Difference in Rates		**+37.9%**		**+58.9%**		**+54.5%**		**+66.4%**		**+53.6%**		**+33.8%**

"Below-Range Sentences" excludes government-sponsored downward departures, as defined in Appendix B of the Sentencing Commission's *Final Report on the Impact of United States v. Booker On Federal Sentencing* (March 2006).
"Presumption Circuits" are the District of Columbia, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.
"Other Circuits" are the First, Second, Third, Ninth, and Eleventh Circuits.
"Difference in Rates" and "% Difference in Rates" calculate the difference, in absolute terms and as a percentage, between the rate of Below-Range Sentences in Presumption Circuits and the rate of Below-Range Sentences in Other Circuits. Calculations based on the percentages shown for Presumption Circuits and Other Circuits may yield slightly different results due to rounding.

Sources: United States Sentencing Commission, 2005 Datafiles, USSCFY05, and Preliminary Data from USSCFY06 (October 1, 2005 through September 30, 2006); United States Sentencing Commission, 2001 and 2002 Datafiles, USSCFY01 and USSCFY02; United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics*, Table 26A; United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 26A.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 9/30/2006		% Change Post-Booker
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**114,318**		
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	14,059	12.3%	42.7%
Above-Range Sentences	306	0.6%	457	0.8%	541	0.8%	382	0.8%	1,686	0.7%	1,816	1.6%	114.1%
Out-of-Guidelines Sentences	6,433	11.7%	6,511	11.1%	5,437	8.3%	2,880	6.0%	21,261	9.4%	15,875	13.9%	+48.4%
D.C. Circuit	**280**		**411**		**477**		**409**		**1,557**		**812**		
Out-of-Guidelines Sentences	23	8.8%	26	6.3%	22	4.6%	24	5.9%	95	6.1%	131	16.1%	+184.4%
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**2,568**		
Out-of-Guidelines Sentences	151	10.2%	168	9.3%	156	8.5%	77	6.0%	552	8.6%	474	18.5%	+114.1%
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**7,301**		
Out-of-Guidelines Sentences	698	17.8%	716	17.6%	786	16.5%	494	14.4%	2,694	16.6%	1,851	25.4%	+52.4%
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**5,128**		
Out-of-Guidelines Sentences	213	8.3%	219	8.2%	231	8.3%	128	6.1%	791	7.8%	924	18.0%	+129.8%
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**10,333**		
Out-of-Guidelines Sentences	269	5.7%	230	4.6%	248	4.4%	170	4.1%	917	4.7%	1,287	12.5%	+187.0%
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**25,508**		
Out-of-Guidelines Sentences	1,622	14.5%	1,475	12.1%	1,121	8.4%	436	4.5%	4,654	10.0%	2,405	9.4%	-5.8%
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**8,518**		
Out-of-Guidelines Sentences	280	6.7%	275	6.2%	277	5.8%	191	5.6%	1,023	6.1%	1,371	16.1%	+184.9%
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**5,008**		
Out-of-Guidelines Sentences	162	6.8%	201	7.5%	166	5.5%	110	4.9%	639	6.2%	798	15.9%	+157.7%
Eighth Circuit	**3,486**		**3,585**		**4,329**		**3,528**		**14,908**		**8,214**		
Out-of-Guidelines Sentences	342	9.8%	376	10.5%	356	8.2%	196	5.6%	1,270	8.5%	1,298	15.8%	+85.5%
Ninth Circuit	**11,893**		**11,733**		**13,288**		**9,377**		**46,289**		**20,658**		
Out-of-Guidelines Sentences	1,996	16.8%	2,101	17.9%	1,463	11.0%	668	7.1%	6,228	13.5%	2,908	14.1%	+4.6%
Tenth Circuit	**2,988**		**3,833**		**4,476**		**3,728**		**15,017**		**9,548**		
Out-of-Guidelines Sentences	250	8.4%	308	8.0%	271	6.1%	190	5.1%	1,019	6.8%	1,125	11.8%	+73.6%
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**10,724**		
Out-of-Guidelines Sentences	427	7.1%	416	6.7%	340	5.3%	196	4.1%	1,379	5.9%	1,303	12.2%	+108.2%
Proportionality Circuits	**36,449**		**39,807**		**43,862**		**32,953**		**153,071**		**80,419**		
Out-of-Guidelines Sentences	3,503	9.6%	3,449	8.7%	2,935	6.7%	1,566	4.8%	11,453	7.5%	10,061	12.5%	+67.2%
Other Circuits	**18,640**		**18,877**		**21,309**		**15,298**		**74,124**		**33,899**		
Out-of-Guidelines Sentences	2,930	15.7%	3,062	16.2%	2,502	11.7%	1,314	8.6%	9,808	13.2%	5,814	17.2%	+29.8%

"Out-of-Guidelines Sentences" excludes government-sponsored downward departures, as defined in Appendix B of the Sentencing Commission's *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* (March 2006).

"Proportionality Circuits" are the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

"Other Circuits" are the District of Columbia, Second, Third, and Ninth Circuits.

"% Change Post-Booker" calculates the percent change, from the Total Pre-Booker to Post-Booker periods, in the rate of Out-of-Guidelines Sentences. Calculations based on the percentages shown for Total Pre-Booker and Post-Booker may yield slightly different results due to rounding.

Sources: United States Sentencing Commission, 2005 Datafiles, USSCFY05, and Preliminary Data from USSCFY06 (October 1, 2005 through September 30, 2006); United States Sentencing Commission, 2001 and 2002 Datafiles, USSCFY01 and USSCFY02; United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics*, Table 26A; United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 26A.

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FILED
FEB 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-5618

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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February 12, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF

The government's attempt to advance the rule that a sentence constituting a substantial variance from the Guidelines must be justified by extraordinary circumstances is unavailing. This rule is inconsistent with *United States v. Booker,* 543 U.S. 220 (2005).

First, in excising the PROTECT Act version of § 3742(e), this Court rejected an appellate review standard that tied the degree of variance to the guideline range as incompatible with a constitutional advisory guideline system.

Second, the rule the government advances violates the bright-line rule, recently reaffirmed in *Cunningham v. California,* 127 S. Ct. 856 (2007), that any fact that increases the penalty for a crime beyond the statutory maximum provided by law must be submitted to a jury. The government's rule requires extraordinary circumstances for sentences that are not within or nearly within the guideline range. This "extraordinary circumstances rule" necessarily demands judicial factfinding, first to compute the guideline range, which, in virtually every case, mandates a sentence greater than that based solely on the facts established by a jury verdict or the defendant's admissions and second, to establish circumstances sufficiently extraordinary to permit a variance from the guideline range. Thus, the government's proposed rule is indistinguishable, for Sixth Amendment purposes, from the mandatory Guidelines that *Booker* held unconstitutional.

Third, the government's contention that uniformity requires appellate focus on the Guidelines rather than § 3553(a) ignores both Congressional intent and the disparities the Guidelines create.

Finally, based on the extraordinary circumstances rule, the government urges deference only to the guideline range, dismissing as "common" the circumstances of the offense and

the characteristics of the offender upon which the district court relied in determining that a 15-month sentence was sufficient but not greater than necessary to satisfy § 3553(a)'s purposes. The district court imposed a "reasonable" sentence.

I. THIS COURT HAS ALREADY EXCISED THE EXTRAORDINARY CIRCUMSTANCES REQUIREMENT AS INCONSISTENT WITH A CONSTITUTIONAL ADVISORY GUIDELINES SYSTEM.

The government notes that the pre-*Booker* standard of review was designed to "reinforce" the Guidelines, Resp. Br. 17, and argues for a post-*Booker* standard of review that will continue to "reinforce" the Guidelines. Resp. Br. 19. Indeed, it argues for a standard of review–requiring that the justification for a non-guideline sentence be more extraordinary the further the sentence varies from the guideline range–that would reinstate two of the changes wrought by the PROTECT Act in 2003 that made the guidelines even more mandatory than they had been: those requiring the courts of appeals to determine whether a sentence outside the guideline range "is not justified by the facts of the case" and whether "the sentence departs to an unreasonable degree from the applicable guidelines range." 18 U.S.C. § 3742(e)(3)(B)(iii), (C) (2004 ed.). This Court excised the PROTECT Act standard of review as inconsistent with a constitutional guideline system, and replaced it with a standard of review based on the pre-2003 text. *Booker*, 543 U.S. at 260-63.

The government, however, misleadingly argues: (1) that under the pre-2003 standard a sentence was "reasonable" if the reasons were "sufficient to justify the magnitude of the departure," citing *Williams v. United States*, 503 U.S. 193, 204 (1992), (2) that this Court adopted the pre-2003 standard in *Booker*, citing 543 U.S. at 261, and (3) that, therefore, "[p]roportionality review using the Guidelines as a

benchmark" is consistent with *Booker*. Resp. Br. 27-28. This erroneous argument misreads both *Williams* and *Booker*.

In *Williams*, 503 U.S. at 203-04, this Court interpreted § 3742(f)(2), which provided for remand of a sentence outside the guideline range if it was "unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable" and was "too high" or "too low." 18 U.S.C. § 3742(f)(2) (1992 ed.). Then as now, the plain language of § 3742(f) did *not* tie the permissible magnitude of departure to the applicable guideline range. The provision that *Booker* excised *did* tie the permissible degree of departure to the guideline range. *Compare* § 3742(e)(3) (2002 ed.) *with* § 3742(e)(3) (2004 ed.) (as amended by the PROTECT Act, requiring review of whether "the sentence departs to an unreasonable degree from the applicable guidelines range"). And that is precisely why it was excised. *Booker*, 543 U.S. at 260 (PROTECT Act version of § 3742(e) "contains critical cross-references to the (now-excised) Section 3553(b)(1) and consequently must be severed and excised for similar reasons."). The Court in *Booker* adopted the pre-2003 text of § 3742(e), which "told appellate courts to determine whether the sentence 'is unreasonable' with regard to Section 3553(a). Section 3553(a) remains in effect and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts . . . in determining whether a sentence is reasonable." *Id.* It was unnecessary to excise § 3742(f) because its literal terms refer to neither § 3553(b) nor the guideline range as a measure of what is an "unreasonable degree," "too high," or "too low." *See* § 3742(f)(2) (2004 ed.). Indeed, the Court's only reference to § 3742(f) was to say that "some provisions will apply differently from the way Congress had originally expected" because "that mandatory system is no longer an open choice." 543 U.S. at 263.

In short, *Booker* has already made clear that the benchmark for unreasonableness is the totality of § 3553(a)'s purposes and factors, not the single factor of the guideline range. The

only court of appeals to reach the question has held that whether a sentence is "too high" or "too low" under § 3742(f)(2) is measured against the "benchmark" of "the range of reasonableness" in light of § 3553(a). *United States v. Jones*, 460 F.3d 191, 197 n.2 (2d Cir. 2006). This is the only interpretation consistent with the Sixth Amendment.

II. REQUIRING "EXTRAORDINARY JUSTIFICATIONS" FOR SENTENCES "SIGNIFICANTLY" OUTSIDE THE GUIDELINE RANGE VIOLATES THE SIXTH AMENDMENT.

This Court recently reaffirmed the "bright-line" rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Cunningham v. California*, 127 S. Ct. 856, 868 (2007) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). For purposes of the Sixth Amendment principle, the "statutory maximum" to which the rule refers "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). The Court applied this rule to the Federal Sentencing Guidelines in *Booker*, holding that because the Guidelines required the judge to impose a sentence that was not authorized by the facts found by the jury, imposition of the Guidelines sentence violated the Sixth Amendment. *See Booker*, 543 U.S. at 235. The remedy for this violation was to render the Guidelines "'[m]erely advisory provisions,' recommending but not requiring 'the selection of particular sentences in response to differing sets of facts[.]'" *Cunningham*, 127 S. Ct. at 870.

Under an advisory guideline system, one capable of preserving the right to a jury trial, judicial factfinding does not make the difference between permissible and impermissible sentences. *See id.* The government, however, asserts that there is no Sixth Amendment impediment to the legal requirement that the facts and circumstances of a case be

more extraordinary the further a sentence varies above or below the guideline range because, it claims, under advisory Guidelines the judge has the authority, based on the jury findings alone, to impose a sentence up to "the statutory maximum provided by the United States Code." Resp. Br. 41-42.

To state the government's position is to identify its fatal weakness. The assertion that judges remain free, based on the jury verdict alone, to reach the United States Code maximum irreconcilably conflicts with the proposed requirement that significant variation from the guideline range be supported by proof of extraordinary circumstances. Quite simply, the government's argument would read the Constitutional majority opinion in *Booker* and its Sixth Amendment antecedents out of existence. *See Cunningham*, 127 S. Ct. at 870 n.15.

The maximum sentence supportable by a jury verdict or guilty plea would seldom, if ever, approach the statutory maximum provided by the United States Code. The circumstances of respondent Fanfan's conviction (in the companion case to *Booker*) illustrate this point. 543 U.S. at 228. The findings by the jury convicting Fanfan only supported a guideline range of 63-to-78 months. *Id.* Application of the Guidelines, however, required judicial factfinding leading to a higher range of 188-to-235 months and, therefore, would have violated the Sixth Amendment. *Id.*

The rule the government advances not only authorizes, but compels the same result. This rule would require the district court to presume the 188-to-235 month range reasonable and sentence within that range absent extraordinary circumstances. The government limits "extraordinary circumstances" to factors that "substantially distinguish [the defendant] from the hundreds of other defendants who share the same general characteristic." Resp. Br. 43. Applying that definition in Claiborne's case, the government dismisses drug

quantity as an ordinary, "common feature" of drug cases failing to support even a 22-month variation. Resp. Br. 42-43. The jury finding that Fanfan's conspiracy involved at least 500 grams of cocaine would seem at least as common to the hundreds of defendants whose juries found their conspiracies to involve at least 500 grams. The extraordinary justification rule, however, would *compel* Fanfan's judge to sentence him at or near the 188-to-235 month range based on facts found by a judge under the preponderance standard. In fact, Fanfan's judge would be barred from sentencing him at the range supported by the jury findings alone unless he could find additional, mitigating facts–facts extraordinary enough to justify a variance almost ten years below the range.

Another example illustrates the Sixth Amendment defect in the government's rule. Under 18 U.S.C. § 924(c)(1)(A)(iii), which prohibits using or carrying a firearm during and in relation to certain offenses, the statute and the applicable guideline require a five-year sentence. 18 U.S.C. § 924(c)(1)(A)(i); USSG §2K2.4(b). If the judge makes the additional finding that the firearm was discharged, the penalty under both the statute and the Guidelines is ten years, doubling the sentence authorized by the jury verdict alone. *See Harris v. United States,* 536 U.S. 545, 556 (2002) (discharge finding is for the judge to make); USSG §2K2.4(b). The ten-year sentence is not authorized, under the extraordinary circumstances rule, unless the *judge* finds that the firearm was discharged (or finds some other aggravating fact that establishes an extraordinary circumstance). Yet if the judge makes the discharge finding, the government's extraordinary circumstances rule requires the judge to impose a sentence twice that authorized by the jury's findings.

The record of reversals of downward variances, *see* FPCD Br. 21-22 & App. A9-10; NYCDL Br. 4-9 & App.2a-4a, shows that the facts needed to enable a judge to impose the sentence supported by jury findings alone will rarely, if ever, exist. *See, e.g., United States v. Gall*, 446 F.3d 884 (8th Cir.

2006) (three years probation unreasonable variance from 30-month guideline minimum despite defendant's withdrawal from conspiracy, exemplary post offense conduct, completion of college, and successful employment); *United States v. Portillo*, 458 F.3d 828, 829-30 (8th Cir. 2006)(reversing downward variance to sentence corresponding with jury verdict, which district court based on the purposes of sentencing and its determination that uncorroborated informant testimony attributing more drugs to the defendant was dubious, because "district court cannot consider credibility as part of its § 3553(a) analysis"); *United States v. Thorpe*, 447 F.3d 565, 567-68 (8th Cir. 2006) (court erred in varying to sentence corresponding with jury verdict based on its discomfort with severity of drug penalties and how little government must prove).

Reasonableness review under *Booker* cannot–as the government would have it–"render academic the entire first part of *Booker* itself." *Cunningham*, 127 S. Ct. at 870 n. 15. "Reasonableness . . . is not . . . the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." *Id.* at 870. "When a judge inflicts punishment that the jury verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. at 303. The extraordinary circumstances requirement compels the application of sentencing ranges enhanced by facts found by judges beyond the jury's verdict in all but the most exceptional cases. This type of appellate review would deprive judges of the freedom to impose a sentence anywhere within the United States Code range based on the verdict or guilty plea alone just as the unconstitutional "mandatory guidelines" system did before *Booker*.

III. THE POSSIBILITY OF VARIANCE FROM THE GUIDELINE RANGE IN EXTRAORDINARY CIRCUMSTANCES DOES NOT AVOID THE SIXTH AMENDMENT VIOLATION.

The government claims that judges have broader discretion to go outside the guideline range because variances under advisory Guidelines are not encumbered by the limits the Guidelines place on departures. Resp. Br. 38-39. Even if true, under the government's version of advisory Guidelines, this distinction is unavailing. In *Blakely*, the state argued a jury verdict enabled a judge to impose the higher range of sentence because the statutory enumeration of grounds for imposing a higher sentence was not exclusive. 542 U.S. at 305. The Court rejected this distinction. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . one of several specified facts . . . or any aggravating fact" the jury's verdict alone did not authorize the court to use the higher range. *Id.* *See also* *Cunningham*, 127 S. Ct. at 865.

Furthermore, the government's claim rests on the false premise that its version of the advisory Guidelines system gives judges meaningfully greater discretion than they had under the mandatory system. The government's view of an "extraordinary justification" requires factors that "substantially distinguish the defendant from the hundreds of other defendants who share the same general characteristic." Resp. Br. 38., 43 & n. 13. It would prohibit or restrict reliance on facts allegedly used to set the guideline range. *See* Resp. Br. 43 & n. 12, 47; *see also, e.g., United States v. Zapete-Garcia*, 447 F.3d 57 (1st Cir. 2006); *United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006); *United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006). And it would exclude non-case-specific grounds, Resp. Br. 49-50, such as a policy disagreement with the Commission. *But see* *Cunningham*, 127 S. Ct. at 862-63; *id.* at 877-78, 879 (Alito, J., dissenting); Senators Br. 29. This is nothing more than the

pre-*Booker* requirement for departures under (the now excised) § 3553(b), which required proof of circumstances "of a kind or to a degree" not adequately taken into consideration by the Commission in formulating the Guidelines.

Indeed, the system advocated by the government appears to be even more restrictive of discretion than the pre-*Booker* system. As the government is at great pains to establish, the extraordinary circumstances requirement is warranted on the theory that the Guidelines incorporate all of the purposes and factors listed in § 3553(a) and promote "uniformity,"[1] defined by the government as adherence to the Guidelines. Resp. Br. 13-16, 19-24, 26, 31. The presumptive guideline system in place before *Booker*[2] at least allowed for the possibility that there might be circumstances of a kind or to a degree not taken into account by the Commission in formulating the Guidelines. The incorporation theory, upon which the system advocated by the government depends, provides "no rationale for ever deviating from the guideline range," and thus

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1. The incorporation theory (originated and adopted absent factual support, *see* FPCD Br. 5-7), has appeared as the sole rationale for the presumption of reasonableness and its companion sliding scale test. *See e.g., United States v. Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) The "logic" proceeds as follows: (1) the Guidelines incorporate all § 3553(a) purposes and factors; (2) therefore, a within-guideline sentence is presumptively reasonable; and (3) therefore, a justification for a non-guideline sentence must be more extraordinary the further the sentence varies from the guideline range. This has become ritual incantation in cases involving a non-guideline sentence. *See, e.g., United States v. Medearis*, 451 F.3d 918, 920 (8th Cir. 2006).

2. Section 3553(b) was added to the Sentencing Reform Act for the purpose of making the Guidelines "presumptive." *See* 124 Cong. Rec. 209 (1978) (unprinted amendment No. 1100 adopted Jan. 23, 1978); Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 41 (1998).

"treat[s] the guidelines as more mandatory than before *Booker*." Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 Ariz. St. L.J. 425, 453-54 (2006).

Not surprisingly, then, appellate courts applying the government's version of reasonableness review frequently reject downward variances on the basis that the grounds relied on are discouraged by, not permitted by, or contrary to a choice by the Commission. *See, e.g., United States v. Ortega-Estrada*, 2006 WL 3491779 *3 (10th Cir. 2006)(disagreement with Commission policy decision to triple count prior assault conviction and to assign it the same number of points as murder was an invalid basis for variance); *United States v. Blackford*, 469 F.3d 1218, 1220 (8th Cir. 2006) (same as to policy decision to preserve prosecutor's discretion despite disparity it caused); *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006) (same as to policies regarding crack-powder disparity).[3] Even if the government's test allows for significant variances in *some* cases, as noted in *Booker*, "[t]he availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself." 543 U.S. at 234 (noting that in "most cases" sentences outside the guideline range will be unavailable).

IV. DISCRETION TO VARY TO AN "INSUBSTANTIAL" DEGREE FROM THE GUIDELINE RANGE DOES NOT AVOID THE SIXTH AMENDMENT VIOLATION.

The government also alleges that the extraordinary circumstances rule does not require Guidelines sentences in most cases, "or even in the vast majority of cases," because it

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3. Variances based on offender characteristics also are frequently rejected as inconsistent with Guideline policy statements deeming such factors never or not ordinarily relevant. *See, e.g., United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006); *United States v. Hampton*, 441 F.3d 284 (4th Cir. 2006); *United States v. Duhon*, 440 F.3d 711,716-17 & n.4 (5th Cir. 2006).

permits insignificant, or insubstantial variances from the guideline range on something less than extraordinary justifications.[4] Resp. Br. 38. This attempted distinction also does not avoid the Sixth Amendment problem. Whatever small variance would be permitted upon lesser justifications, the sentence resulting from this new and unspecified amount of "wiggle room" is still joined at the hip to the elevated guideline ranges that result from judicial factfinding. To again use the Fanfan example, an insignificant variance from the guideline range derived only from the facts of his conviction alone (perhaps a variance of 10 months at either end of the range of 63-to-78 months) produces a substantially shorter sentence than an insignificant variance from the Guidelines calculation based on judicial factfinding (188-to-235 months). *See Booker*, 543 U.S. at 228-29.

By statute, the top of a guideline range can be no more than 25 percent higher than the bottom of the range. 28 U.S.C. § 994(b)(2). The holding in *Booker* did not turn on Congress's choice of 25 percent instead of some higher number (say 40 percent), and there is no constitutional difference between the two. Yet the government's "extraordinary circumstances" requirement for a "substantial" variance does nothing more than create a *de facto* range of greater than 25 percent (although it studiously avoids identifying the line between substantial and insubstantial variances). Under the government's approach it is still the case that judicial

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4. The government's claim that its sliding scale approach has its "primary force" only when a sentence is "significantly outside the range", Resp. Br. 38, is both beside the point and incorrect. In the very case it cites for this proposition, the Tenth Circuit made clear that it always looks to the "discrepancy" between the sentence imposed and the guideline range to determine whether the sentence was reasonable. *United States v. Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006). *See also United States v. Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) (rejecting argument that test applies based on percentages, explaining that the test is whether the "explanation is sufficiently proportional to the extent of the variance").

factfinding will authorize the imposition of sentences that would be unauthorized without additional factfinding, a result that violates *Apprendi*'s bright-line rule.[5]

V. REQUIRING SENTENCES TETHERED TO THE GUIDELINES PERPETUATES TRUE DISPARITY AND THWARTS THE DEVELOPMENT OF BETTER SENTENCING PRACTICES.

The government's position not only directly conflicts with both majority opinions in *Booker,* but its underlying policy rationale rests entirely on the demonstrably inaccurate premise that the Guidelines incorporate all of the § 3553(a) purposes and factors and promote the "uniformity" Congress had in mind. Resp. Br. 13-16, 19-24, 26, 31. Unprincipled uniformity, which the government advocates, elevates rules above reason by requiring offenders to be treated alike because the Guidelines say so, even when they differ in their culpability, the harm caused by their crime, or in their risk of recidivism. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003). True disparity, however, "gets its content from the purposes of sentencing. Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take into account differences among offenders that are relevant to our purposes and priorities." Hofer, *Immediate Effects*, 38 Ariz. St. L. J. at 442; U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of

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5. A presumption that the Guidelines are reasonable also creates a "significant danger" of recreating a sentencing scheme that is unconstitutional under the Fifth Amendment. *United States v. Grier*, No. 05-1698, 2007 WL 315102, *23 n.37 (3d Cir. Feb. 5, 2007) (en banc) (Ambro, J., concurring) (citing Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 Fed. Sent. R.. 170 (2006)).

Sentencing Reform 80, 113 (2004) (Fifteen Year Report). *See, e.g., United States v. Ennis*, 2006 WL 3831216 (D. Mass., Dec. 22, 2006) (purpose of career offender guideline would be negated if used to give low-level drug conspirator sentence twice as long as that received by drug suppliers).

Judicial discretion is essential to avoiding true disparity, first, to take account of factors bearing on sentencing purposes that the Guidelines do not, and second, to provide feedback through which the Guidelines might be improved. Understanding this necessity, Congress did not expect that the Guidelines would be developed, applied, or enforced in a mechanistic fashion. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 52-54; Senators Br. 10-11, 14, 29; *Koon v. United States*, 518 U.S. 81, 92, 97 (1996). Instead, it directed the Commission to assure that the Guidelines met the purposes of sentencing set forth in § 3553(a)(2), to measure whether they were being met, *see* 28 U.S.C. §§ 991(b)(1)(A), (b)(2), and to see that they achieved the linked goals of avoiding unwarranted disparity and maintaining sufficient flexibility to permit individualized sentences when warranted. *See* 28 U.S.C. § 991(b)(1)(B).

The government makes the bald assertion that the Guidelines are the "appropriate benchmark" because they provide a "generally accurate" application of the § 3553(a) purposes and factors for "various categories of offenses and offenders." Resp. Br. 21-22. This assertion is plainly wrong. *See* NACDL Br. 12-25; Miller et al. Br. 11-23; WLF Br. 10-25; Lee Br. 10-14; NYCDL Br. 9-11; Sentencing Project Br. 7-17. As has been well documented, "the ideal model of policy development envisioned in the [Sentence Reform Act] was never fully implemented." Hofer, *Immediate Effects*, 38 Ariz. L. J. at 450; *see also, e.g.*, Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005); Linda Drazga Maxfield, *U.S. Sentencing Commission, Final Report: Survey*

of Article III Judges on the Federal Sentencing Guidelines ES2-7 (Mar. 2003).

The government dismisses as mere imperfection, Resp. Br. 24 & n. 4, the effect of the Guidelines in promoting disparities Congress sought to avoid. Sentences under the mandatory Guideline system were far more highly correlated with race than before the Sentence Reform Act, *see* Fifteen Year Report at 115, 122, as the result of rules (like the crack guideline) that do not achieve sentencing purposes, *id.* at 47-55, 76, 113-14, 117, 131-35, 141, and the government's practices and policies.[6] Regional disparity persisted and even increased in drug cases, again largely due to the government's actions. *Id.* at 94, 102, 103, 106, 111-12, 140-42. Indeed, it is the government, not judges, that has created the widest variation among districts and among circuits after *Booker*,[7] but unlike judicial decisions, prosecutors' decisions are hidden from view and unreviewable.[8] The government prefers curtailment of judicial discretion because it allows prosecutors more power to dictate sentencing outcomes–through its charging decisions, control over relevant conduct "facts" that are "proved" without reliable procedural safeguards, substantial assistance departures, "fast track" departures, and the third acceptance of responsibility point,

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6. Fifteen Year Report at 91, 102-05, 141; U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002); U.S. Sentencing Commission, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998).

7. U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 88-92 (March 2006) (Booker Report).

8. Fifteen Year Report at 82.

among other tools.[9] *See* Hofer, *Immediate Effects*, 38 Ariz. L. J. at 447 ("disparity-talk" often used "as a cover to further restrict judicial discretion, empower prosecutors, and pursue harsher sentences divorced from any comprehensive philosophy of punishment.").

Contrary to the government's arguments, the Guidelines "permit typical offenders to receive sentences equal to those received by the most aggravated and dangerous offenders or the least culpable and threatening ones," Resp. Br. 21, according to the Department of Justice and the Commission.[10] *See* U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 4, 1994)[11]; U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* (May 2002). The Guidelines also create vastly disparate sentences for comparable offenses and offenders. For example, the guideline sentence for the same amount of powder cocaine in

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9. *See, e.g.*, Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines*, 105 Colum. L. Rev. 1315, 1336-40 (2005); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1714 (1992); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. Rev. 649, 670 (2003); M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C.L. Rev. 533, 569-71 (2005); Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not*, 43 Hous. L. Rev. 279, 321-23 (2006).

10. Contrary to the claims of the government and the Commission, *see* Resp. Br. 49-50 and USSC Br. 27-28, Congress did not mandate the disparity reflected in the drug or career offender guidelines; rather, this is the result of choices the Commission made. *See* Fifteen Year Report at 49; Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker* 49-51 (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf.

11. The Justice Department's report may be accessed at http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

this case would have been 6-12 months. USSG §§2D1.1(c)(14), 3E1.1(a) (2003 ed.). The district courts have tried to remedy this disparity after *Booker*, *see* Booker Report at 128 (rate of below-guideline sentences in crack cases tripled), but restrictive post-*Booker* caselaw which the government promotes restricts judges "to focusing only on the record in a particular case," Resp. Br 21, 49-50, an approach with which the Senators specifically disagree. Senators Br. 23 n.5. It particularly blinks reality to claim that the Guidelines are the appropriate benchmark in this crack case. *See* Senators Br. 21 ("[T]he Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and cocaine–a ratio currently incorporated in the sentencing guidelines–demonstrate that the guidelines do not always reflect objective data or good policy."). The criminal history rules rest on *no* empirical evidence, and overstate the risk of recidivism (both by excluding factors that predict reduced recidivism and including factors with no predictive value) and create racial disparity without serving sentencing purposes.[12]

Judicial discretion is therefore necessary to achieve sentencing purposes and avoid what Congress meant by unwarranted disparity. Yet the government claims that the Guidelines are the only appropriate benchmark, Resp. Br. 25, and that sentences imposed outside the guideline range by judges create disparity. *Id.* at 25-26. In fact, the Commission "lack[s] good data on all legally relevant considerations that might help explain differences in sentences," a problem "especially severe regarding circumstances that might justify departure from the guidelines," because the Commission

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12. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), *Recidivism and the First Offender* (May 2004); Fifteen Year Report at 133-34.

collects data on such circumstances only if a departure was granted, but not otherwise. Fifteen Year Report at 119. Thus, the Guidelines (by prohibiting and restricting departures) create a false benchmark for disparity and deprive the Commission of relevant information about considerations that would more effectively and efficiently satisfy the purposes of sentencing.

Booker provides a chance for the Commission to use feedback from judges to further "better sentencing practices" in response to the wealth of information that sentencing based on § 3553(a)'s purposes provides. In that way, unwarranted disparity might be avoided. *Booker*, 543 U.S. at 263.[13]

If district courts in all circuits were genuinely free to exercise their discretion to consider all relevant § 3553(a) purposes and factors, there may well be more non-guideline sentences in those circuits that currently restrict discretion, but less true disparity. *See* Hofer, *Immediate Effects*, 38 Ariz. St. L.J. at 456-57, 462. Indeed, evidence from the states shows that presumptive guidelines are no more successful in reducing disparity than advisory guidelines, and that advisory guidelines have several advantages, including (1) greater judicial discretion as a check on unwarranted uniformity and unwarranted disparity created by prosecutorial practices; (2) less resistance to change; and (3) greater transparency. *See* Kim S. Hunt & Michel Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 Fed. Sent. R. 233, 2005 WL 2922198 **6-12 (April, 2005).

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13. *Compare* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988) *with* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent R. 180, 1999 WL 730985 (Jan./Feb. 1999); American Bar Association Justice Kennedy Commission, *Reports with Recommendations* (Aug. 9, 2004); Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems*, 32-34 (June 7, 2005).

Reasonableness review as *Booker* intended, focused on the district court's explanations in light of all relevant § 3553(a) purposes and factors, is not "abdication." *See* Resp. Br. 9, 30. An appellate court must review the record to confirm that the judge in fact considered § 3553(a)'s factors and sentencing purposes. *See* FAMM Br. 22-28. The review includes a substantive component when the record may reflect that a judgment, "although procedurally proper, is nonetheless arbitrary and capricious and manifestly irrational." FAMM Br. 27. Appellate courts do not abdicate their role by ensuring that sentences rest on reasoned judgment, rather than whim or blind adherence to the rules. Such review advances Congress's goals by ensuring federal sentences reflect § 3553(a)'s factors and purposes and improves the feedback mechanism from the courts to the Commission. *Booker*, 543 U.S. at 263. The government's version of review focused on the Guidelines accomplishes neither goal.

VI. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS REASONABLE IN LIGHT OF SECTION 3553(A)'S PURPOSES AND FACTORS AND THE REASONS GIVEN.

The government dismisses the judge's reliance on the circumstances of the case (the small drug quantity, the lack of violence or weapon) and Claiborne's characteristics (his lack of prior criminal history or imprisonment, devotion to his family, and rehabilitative progress) as merely "common features" of drug cases. Resp. Br. 42-43. Indeed, it is all too common that low-level drug offenders with little risk of recidivism receive sentences that are greater than necessary to satisfy legitimate sentencing purposes, as the Guidelines assign penalties based on drug quantity that overstate offense seriousness, reflect an assumption of violence when none occurred, and fail to take account of factors (like employment history and first offender status) that predict reduced recidivism. *See* pp.14-16, above; Senators Br. 21, 27-28, 29.

After *Booker*, § 3553(a) requires judges to address these features in all cases, and "[i]f something about the circumstances of a case makes the crime . . . less serious than other crimes receiving that offense level" -- such as that the quantity of drugs is neither an accurate measure of harm nor typical of a drug kingpin or manager--"those circumstances can justify an outside-range sentence." Hofer, *Immediate Effects*, 38 Ariz. St. L. J. at 454 n. 145, 461; *id.* at 445-46 & n. 103. A number of the district court's reasons consisted of "unique factors. . . 'little susceptible . . of useful generalization,'" evaluation of which Congress entrusted to district courts "better positioned" to evaluate them. *Koon*, 518 U.S. at 99. This is not lost on the Amici Senators who, well acquainted with the Act's evolution and familiar with the facts here, concurred that "the district court may indeed have been correct that a sentence of 15 months instead of 37 [to] 46 months was warranted in light of the specific facts of the offense and the defendant's background." Senators Br. 27, 29. Only the district judge (not the court of appeals or the Commission), has special competence to "weigh what can't be measured," such as remorse, resilience, and contrition. *See* Remington, Frank J., *The Federal Sentencing Guidelines As A Criminal Code: Why the Model Penal Code Approach is Preferable*, 7 Fed. Sent. R. 116, 1994 WL 780781 (Nov./Dec. 1994). The government's emphasis on Claiborne's volunteered admission that he tried to sell crack for two months leading up to his arrest does not render the judge's choice unreasonable. Resp. Br. 45, 49. The veteran district judge was undoubtedly aware that few small time crack sellers get arrested at their first sale, and that the candor of this unsolicited detail was a factor in mitigation. The government's claim that the judge did not rely on Claiborne's role in supporting his family fails in the face of the judge's many references to it as she imposed sentence. Resp. Br. 48; J.A. 70-71.

These factors must be considered under § 3553(a) and they compel substantial deference on appeal to provide district courts the flexibility necessary to do so. "So long as the overall sentence is 'sufficient, but not greater than necessary to comply' with the [statutory sentencing] goals, the statute is satisfied. Section 3553(a)." *Koon*, 518 U.S. at 108. The district court's sentence was certainly within the range of reasonableness.

CONCLUSION

The Eighth Circuit's decision should be reversed with instructions to affirm the district court.

Respectfully submitted,

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APPENDIX

STATUTORY ADDENDUM

STATUTES

18 U.S.C. §924 Penalties (2006 ed.)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses, a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 3553(a) (2004 ed.). Imposition of a sentence

(A) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any

amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence

(1) In general.– Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court

shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3742. Review of a Sentence (2002 ed.)

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for–

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227, of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. 3742. Review of a Sentence. (2004 ed.)

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall give

due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. § 3742. Review of a sentence (1992 ed.)

(f) Decision and disposition.– If the court of appeals determines that the sentence–

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

18 U.S.C. § 3742. Review of a sentence (2004 ed.)

(f) Decision and disposition.– If the court of appeals determines that–

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings which such instructions as the court considers appropriate, subject to subsection (g)

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

28 U.S.C. §991 (2004 ed.). United States Sentencing Commission; establishment and purposes

(b) The purposes of the United States Sentencing Commission are to–

(1) establish sentencing policies and practices for the Federal criminal justice system that–

(A) assure the meeting of the purposes of sentencing as set forth in Section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors, not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

GUIDELINE PROVISIONS

USSG §2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 944(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.

(d) Special Instructions for Fines

(1)Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

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Nos. 06-5618 and 06-5754

In the Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

VICTOR A. RITA, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals and families whose lives have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation, and the characteristics of the offender. In short, FAMM believes that the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and *sufficient but not greater than necessary* to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

FAMM believes that this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), represented a significant and positive step toward those goals. FAMM is concerned, however, that the federal courts of appeals have too often failed to heed the lessons of *Booker* and in general

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

have, subtly but effectively, reinstated the inflexible Guidelines regime that this Court has rejected.

SUMMARY OF ARGUMENT

I. The core congressional command in 18 U.S.C. § 3553(a) is that district courts must "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. The statutory language is an elegant distillation of one of the most long-established and influential maxims in criminology: the principle of parsimony. That principle, which provides that punishment should *never* exceed the minimum necessary to effect its purposes, has deep roots in American soil. It was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham. The maxim was given new currency in the twentieth century and was one of the foundational ideals for a number of reform-minded criminal law scholars whose efforts culminated in the Sentencing Reform Act of 1984 (SRA).

The principle of parsimony has now reasserted itself in light of *Booker*. By excising a conflicting command in 18 U.S.C. § 3553(b)(1) that district courts must hew to the Sentencing Guidelines, the remedial majority in *Booker* left the principle of parsimony as the sole binding substantive feature of the statutory sentencing scheme. Federal courts must follow that congressional command at every step of the sentencing process just as seriously as they were required to follow the Guidelines before *Booker*.

II. Section 3553(a) also contains a second mandatory feature: the procedural requirement that district courts "shall consider" a variety of expressly enumerated factors in fashioning sentences. In requiring courts to formulate every sentence by considering a defined set of philosophical principles and a range of specified sentencing-related factors, § 3553(a) reflects the overriding importance of two indispensable elements of just sentencing: reasoned judgment and individual-

ized tailoring. Section 3553(a) directs district judges to think carefully about the general purposes of punishment; the history and characteristics of the offender; the nature of the offense; and the views of the Sentencing Commission. District judges must then exercise reasoned discretion to tailor a sentence for the particular person who stands before the court. Section 3553(a), in short, creates a regime in which mechanical calculation is not to be elevated over individualized consideration, and in which bureaucratized punishment is not to supplant human judgment.

Given the principle of parsimony and § 3553(a)'s requirement that district courts individually consider a range of specified sentencing factors, the statute provides no basis for a presumption in favor of a guideline sentence (or, similarly, a requirement that an out-of-guideline sentence be justified by "extraordinary circumstances"). Nothing in the statute's text or structure provides any foundation for concluding that a sentence calculated under § 3553(a)(4), which was preeminent only because of the now-excised portion of § 3553(b)(1), is entitled to special significance for purposes of appellate review. By creating Guidelines-focused presumptions, several circuits have acted at odds with the basic reasoning of the remedial majority opinion in *Booker*, and have impermissibly substituted a differential standard of appellate review for the across-the-board reasonableness standard announced in that opinion.

III. The task of giving content to *Booker*'s "reasonableness" standard for appellate review must be dictated by what the statutory text and structure actually require. The purpose of such review is modest, but significant: to ensure that district courts do not stray unreasonably from their core statutory obligation to impose individualized sentences consistent with the bedrock imperative of parsimony, which take into account the factors specified in § 3553(a). Whether a sentence falls within a guideline range, above it, or below it, the same criteria should be applied in determining whether a sentence is reasonable. Several additional points about the nature of

post-*Booker* appellate review follow from these basic observations.

A. The plain terms of § 3553(a) show that process matters. Meaningful appellate review of sentences imposed under that provision is possible only to the extent that the district court provides a record demonstrating that it has considered all that the statute requires. The more thorough and well-documented the district court's consideration of the statutory factors, the greater the likelihood that the resulting sentence should be upheld as reasonable. This does not mean that a sentence imposed pursuant to correct procedures invariably must be upheld. But it is to say that the primary task of appellate courts should be to ensure that the procedural requirements of § 3553(a) have been satisfied.

B. Once an appellate court is satisfied that a procedurally correct sentence has been imposed, further review of the sentence for reasonableness should be guided by two principles. First, to ensure that a court of appeals retains an ability to remedy a true outlier sentence, while ensuring that the appellate court does not substitute its judgment for the decision of the judge who actually looked the defendant in the eye, the appellate court should be permitted to review the substantive sentencing result only under an *extremely* restrictive standard. Second, because a district court's primary task is to comply with the parsimony requirement in § 3553(a), the reviewing court should always ask itself whether the district judge imposed the least restrictive sanction necessary to achieve the specified purposes of sentencing. If the court of appeals is *not* convinced that the district judge reasonably concluded that he or she imposed the least severe punishment that still would have satisfied the specified purposes of sentencing, then the sentence must be vacated.

If the Court articulates the scope of reasonableness review in such a way, FAMM believes that the federal sentencing process will move closer to embodying the attributes of a fair and humane system of justice: respect for the law as written, individualized consideration of individual circum-

stances, and the treatment of all people, including criminal defendants, as ends rather than as means.

ARGUMENT

I. Congress Has Directed that the Principle of Parsimony, Which Has Roots in Our Nation's Founding, Must Be the Touchstone of Federal Sentencing Decisions

In 18 U.S.C. § 3553(a), Congress required that district courts "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. That imperative—the principle of parsimony—is best understood by reference to its historical roots.

A. "All punishment which is not derived from necessity," wrote Montesquieu in 1748, "is tyrannical." Baron Charles de Montesquieu, The Spirit of the Laws, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This simple but profound idea was to have immense influence on criminal law reformers from the eighteenth century to the twentieth. Indeed, Spirit of Laws "was one of the first works to treat the problem of criminal law critically and extensively, and, as such, is considered to be of great importance to the 18th century movement for criminal law reform." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 811 (1975).

Writing in 1764, the great Italian criminologist Cesare Beccaria openly acknowledged his debt to Montesquieu in formulating his own philosophy of punishment:

> Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's

> right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

Cesare M. Beccaria, An Essay On Crimes and Punishments 20 (Adolph Caso ed. 1984) ("Caso"). Beccaria's basic insight, which he derived from Rousseau's theory of the social contract, was that each individual, in forming political society, "would choose to put into the public stock the smallest portion possible" of his liberty, "as much only as was sufficient to engage others to defend it." *Id.* at 21. For that reason, punishment must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.* Beccaria thus argued that all punishments that "exceed the necessity of preserving" the bonds holding individuals together in society "are in their nature unjust." *Id.*

Influenced by Beccaria, the English philosopher Jeremy Bentham advocated a very similar doctrine, although he justified it in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*" Jeremy Bentham, An Introduction to the Principles and Morals of Legislation, ch. XIV, para.13 (1781). Parsimony, according to Bentham, derives from a straightforward cost-benefit calculus: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. The fact that this same principle of punishment could be grounded in both the social-contract and the utilitarian traditions undoubtedly helps account for its widespread acceptance and importance in the years to come.

And, indeed, these thinkers and their ideas had an immense influence on the founding generation in America. "In

every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813; see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (observing that "Beccaria and his French and English followers influenced American thought in the critical years following our Revolution."). An American edition of Beccaria's treatise possibly appeared as early as 1773, and certainly no later than 1776. See Caso 7 (Editor's Introduction). In the years between the signing of the Declaration of Independence and the ratification of the Constitution, "the book appeared in translation in practically every cultural center of Europe and America." *Id.* During this period, American lawyers and political leaders were making serious efforts at legal reform, attempting to bring American law into greater harmony with the principles of justice and liberty that animated the Revolution more generally. See Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 814-16. In particular, "a general perception existed that a need existed to ameliorate the criminal penalties." Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 AM. J. LEGAL HIST., 55, 79 (2004). The European theorists who advocated for parsimony in the meting out of criminal punishments provided much of the intellectual horsepower for these reform efforts. *Id.* at 78-79.

Thomas Jefferson, in particular, was deeply influenced by Beccaria. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 89 (2005). Jefferson's work in the 1770s as part of the Virginia Committee of Revisors for the reform of the State's legal system drew on Beccaria's insistence on strict proportionality between punishment and crime. The annotations to Jefferson's 1778 "Bill for Proportioning Crimes and Punishments" contain multiple references to Beccaria's treatise, and in a later letter, Jefferson noted that "'Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and inefficacy of [punishing] crimes by death.'" Schwartz &

Wishingrad, *supra*, 24 BUFF. L. REV. at 818. John Adams was intellectually indebted to Beccaria as well. Adams owned a copy of the 1775 London edition of *On Crimes and Punishments*, and he thought highly enough of Beccaria's work both to give the book as a gift to his son in 1800, see Caso at 9, and to quote Beccaria during his famous defense of the British soldiers accused of murder during the Boston Massacre, see Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813-14.

B. As the text of § 3553(a) indicates, the Enlightenment-era insights of Montesquieu, Beccaria, and Bentham that punishment must be not greater than necessary to advance a particular objective are not some moribund historical curiosity. Through the work of scholars whose efforts at criminal law reform echoed that of the founding generation, the principle of parsimony was given new currency in the twentieth century. Foremost among these reformers was Norval Morris of The University of Chicago Law School. Morris identified parsimony as one of the basic norms that must guide any legitimate sentencing process. See generally Michael Tonry, *Preface*, 32 CRIME & JUSTICE vii, viii (2004) (describing Morris as "a criminal-justice institution builder of unmatched influence, and his ideas about punishment have transformed the ways people think"). In Morris's influential formulation, the parsimony principle stated that "[t]he least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974); see also Tonry, *supra*, 32 CRIME & JUSTICE at ix (explaining that "a principle of parsimony requires imposition of the least severe applicable punishment unless good, empirically grounded reasons exist for doing more"). Like Beccaria, Morris argued that parsimony is not merely a utilitarian virtue, but also a moral imperative. Morris thus wrote that a "system of criminal justice that is not infused with parsimony in punishment * * * creates an intolerable engine of tyranny." Norval Morris, Madness and the Criminal Law 155 (1982).

Although Morris was uniquely influential, he himself observed that he was hardly alone in advocating parsimony as the touchstone of criminal sentencing. He noted that a presumption in favor of less severe punishments "pervades all recent scholarship and most legislative reforms. Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond social need is, presumably, what defines cruelty." Morris, *supra*, 72 MICH. L. REV. at 1163. Thus, in endorsing the parsimony principle, Morris was "on well-trodden ground"; the "American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and two recent national crime commissions have advocated parsimonious use of imprisonment." Andrew Rutherford, *A Review of Norval Morris' The Future of Imprisonment*, 66 J. CRIM. & CRIMINOLOGY 380, 383 (1975).

The widespread acceptance of the parsimony principle in our own time should come as no surprise. Indeed, it seems almost intuitive to say that punishment not limited by a principle of parsimony is both immoral and wasteful; such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). In pursuing the goal of parsimony, therefore, it must always be remembered that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). Moreover, this emphasis on the need to justify a particular quantum of punishment against a set of defined goals illustrates that the parsimony principle includes both a substantive and a procedural dimension. Substantively, it "limits punishments to the least restrictive sanction possible," while procedurally, it "requires the state to prove why the offender deserves a particular punishment." *Id.* at 1015.

C. Just as parsimony is not an eighteenth century relic, neither does it find a home only in the academic library or

lecture hall. To the contrary, it is now a congressional command. When Congress enacted the Sentencing Reform Act of 1984 (SRA), it distilled the philosophical idea of parsimony into the statutory requirement that district courts "*shall impose a sentence sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a) (emphasis added). Implicitly acknowledging Morris's understanding that parsimony requires a set of defined social purposes for punishment, paragraph (2) seeks to capture the four generally accepted justifications of criminal punishment. These are: retribution (subparagraph (A)); deterrence (subparagraph (B)); incapacitation (subparagraph (C)); and rehabilitation (subparagraph (D)). Congress's decision to include a parsimony requirement in the SRA was hardly radical. In fact, given the central role that the parsimony principle occupied in sentencing reform circles in the years leading up to the enactment of the SRA (which was nothing less than an implementation of the Founders' values), it arguably would have been more remarkable had the new law *not* accounted for the concept of parsimony.

As originally enacted, however, the command to impose sentences based on the principle of parsimony stood in direct tension with a rival statutory obligation. At the same time that § 3553(a) instructed judges to impose a parsimonious sentence, § 3553(b)(1) instructed them that "the court shall impose a sentence of the kind, and within the range," provided by the applicable provision of the Sentencing Guidelines. *Booker*, 543 U.S. at 259 (Breyer, J.). In *Booker*, this Court noted the patent conflict between § 3553(a) and § 3553(b)(1): "While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court 'shall impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 233-34 (Stevens, J.).

The tension created by these competing sentencing directives was a product of the SRA's convoluted legislative history and the realities of political compromise. The Senate was the primary force behind the federal sentencing reform effort, and most of the provisions of the final bill originated in that body. This was true of § 3553(b)(1). See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 271 & n. 296 (1993). The parsimony directive, however, originated in the House of Representatives. A bill sponsored by Representative Conyers and reported out of the House Judiciary Committee in June 1984—a bill that was more in line with a system of advisory guidelines—included a provision directing judges "to impose the sentence (whether or not a departure from advisory guidelines) that *would be the 'least severe' sufficient to serve the purposes of sentencing*." *Id.* at 262 (quoting H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added)). In October 1984, "Senator Mathias succeeded in obtaining an amendment to add a new first sentence to the directives to the sentencing court along the lines suggested by Representative Conyers." *Id.* at 271. It was this amendment (co-sponsored by Senator Thurmond) that added the "sufficient, but not greater than necessary" language eventually codified in § 3553(a). See *id.* at 271-72; 130 CONG. REC. 29,870 (1984).

Under the House bill, the obligation to impose a sentence consistent with the principle of parsimony—rather than the Guidelines—would have been the primary command given to the district courts. Thus, where the Guidelines suggested a sentence that the court deemed more severe than necessary, the Guidelines would have had to give way. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. When the parsimony directive was added to the Senate bill, however, it was forced to vie for influence with what became § 3553(b)(1)'s command to abide by the Guidelines. Because Congress never addressed, much less resolved, the tension, *id.*, the courts and the Sentencing Commission were left to work it out.

But, instead of confronting the statutory contradiction as a problem to be solved through ordinary principles of construction, the courts "essentially ignored not only the parsimony language, but the entire set of congressional directives to judges in 3553(a)." Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746 (1999). Indeed, the parsimony provision became "almost hortatory in practice when placed against the mandate that erects a presumption in favor of the guideline sentence." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. The obligation to impose a Guidelines-compliant sentence thus ultimately trumped the requirement of parsimony. That triumph of § 3553(b)(1) was ensured primarily by two factors: this Court's repeated admonitions that the Guidelines were to be followed, see, *e.g.*, *Stinson* v. *United States*, 508 U.S. 36, 42 (1993); *Williams* v. *United States*, 503 U.S. 193, 198 (1992), and the ever-present threat of appellate reversal for judges who strayed from what the Guidelines required, see 18 U.S.C. § 3742(e)(3)(B)(ii); *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).[2]

All of that changed, however, with the decision in *Booker*. The remedial majority opinion resolved the conflict between the parsimony directive and the Guidelines sentencing command by invalidating the two provisions of the SRA that had kept the parsimony directive from playing its proper role in the federal sentencing process for the previous two decades. *Booker*, 543 U.S. at 259 (Breyer, J.) (holding that § 3553(b)(1) and § 3742(e) had to be severed and excised). The result of this statutory surgery is that the parsimony di-

[2] The hegemony of § 3553(b) was not an inevitable (or necessarily correct) outcome. See, *e.g.*, *United States* v. *Davern*, 937 F.2d 1041, 1042 (6th Cir. 1991) (en banc) (Merritt, J., dissenting); *United States* v. *Denardi*, 892 F.2d 269, 276 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part) (arguing that the parsimony directive was binding and had to be followed every bit as much as § 3553(b)).

rective in § 3553(a) now stands as the sole substantive mandate that binds district judges when they impose sentences. *Id.* at 261. Federal courts therefore must take the congressional command of parsimony seriously at every step of the sentencing process. In this sense, the SRA now resembles something akin to the original House bill described above. As in that bill, the Guidelines now exist *only* as advisory provisions that a sentencing court must consider, but before which it need not bow. *Booker*, 543 U.S. at 246, 264. The parsimony directive has now prevailed, and the obligation to impose a sentence "sufficient, but not greater than necessary" to achieve the specified purposes of sentencing is now preeminent. When that obligation clashes even slightly with the sentence suggested by the now-advisory Guidelines, it is the Guidelines that must give way.

II. Presumptions In Favor of the Guidelines, and Standards of Review that Accord Special Weight to the Guidelines, Are Inconsistent with the Commands of Congress Set Forth in 18 U.S.C. § 3553(a)

A. In the wake of *Booker*, federal sentencing policy remains a statutorily defined system. Now, however, *every* sentencing factor enumerated in § 3553(a), not merely § 3553(a)(4), must be respected. Any analysis of what reasonableness review should entail, therefore, must begin with a careful look at what the text of § 3553(a) requires, and what it does not.

Section 3553(a) includes both a substantive command and a procedural one. The substantive command is, of course, the requirement of parsimony: the district court must impose a sentence that is no more severe than necessary to achieve the purposes of punishment set forth in § 3553(a)(2). To discharge this obligation, a sentencing court must take into account each different purpose of sentencing and determine how each of them would (or would not) be advanced by reducing (or increasing) a quantum of punishment. The procedural command, which compels the sentencing court to "consider" each enumerated factor (necessarily before com-

plying with the substantive directive), reinforces the overarching substantive obligation to impose a parsimonious sentence. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 82-83 (2005) (factors are to be considered "subject to the overall requirement of parsimony"). Each directive is mandatory: the sentencing court *must* consider each of the sentencing factors that Congress has prescribed, and then, with that set of considerations in mind, *must* act parsimoniously.

The seven specific factors that § 3553(a) instructs district courts to consider are:

- "the nature and circumstances of the offense and the history and characteristics of the defendant";
- the four general purposes of punishment;
- the "kinds of sentences available";
- the applicable guideline range;
- "any pertinent policy statement" of the United States Sentencing Commission;
- the need to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and
- the "need to provide restitution" to victims.

18 U.S.C. § 3553(a)(1)-(7). The requirement that the court "consider" each of these elements reflects the importance of two basic—and we think indispensable—components of just sentencing: individualized tailoring and reasoned judgment. The kind of consideration mandated by § 3553(a) ensures *both* that the ultimate sentence is appropriate to the particular facts and circumstances of the individual defendant *and* that it is the product of a clear and established set of principles and standards.

The consideration process begins with a careful evaluation of the specific individual who stands before the court.

See 18 U.S.C. § 3553(a)(1).[3] The judge must ask who that person is and how he or she came to commit the crime. The court must also ask how serious the offense was, how likely the defendant is to commit other crimes, and whether there is a reasonable possibility that particular sentencing options will help that defendant rehabilitate or become a more productive member of society. Once those issues have been considered, the court must then ponder the sentencing range under the relevant Guidelines provisions, as well as any formal statements put forward by the Sentencing Commission. As with all of the § 3553(a) factors, however, the court's obligation is only to "consider" the work of the Commission; there is no longer any applicable statutory requirement of deference or obedience either to the guideline range or to any policy statement.

The mandatory consideration process also facilitates reasoned decision-making. By examining each of the § 3553(a) criteria, judges are compelled to reflect on general principles of punishment and the myriad elements that make up a criminal sentence. The procedural directive contained in § 3553(a) is designed to "encourage sentencing judges to exercise their own judgment regarding the purposes of sentencing and the factors relevant to sentencing." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 271. Performed as intended, therefore, the consideration process does not entail the checking of items on a list; instead, it is an occasion for the sentencing judge to make a reasoned moral choice about how to punish a person most appropriately in light of all the facts and circumstances of his or her case. One important consequence of this process is that it requires every sentencing court to take full moral and legal responsibility for the sentence imposed. No longer can a judge deflect responsibility

[3] We do not suggest that the statute must be construed to require a district court to consider the enumerated factors in the order stated. For example, a judge might find it prudent first to consider what limits may exist on the range of lawful choices, as required by § 3553(a)(3).

onto the bureaucracy of the Sentencing Commission or take refuge behind a numerical grid. Such direct accountability requires the exercise of "deliberation and moral judgment," Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1256 (1997)—something that is a profoundly important part of the traditional craft of judging, but that has been lost in the era of mandatory Guidelines.

Sentencing based exclusively on the Guidelines represented the triumph of "bureaucratic penalization," in which individualized consideration and reasoned judgment were jettisoned in favor of uniform administrative regulations and routine arithmetic. *Id.* at 1254; see also Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986) (stating that the sentencing process under the Guidelines could almost be "performed by a computer or an accountant"). That is no longer so. Whereas mandatory Guidelines sentencing pursuant to § 3553(b)(1) and § 3553(a)(4) tended to transform defendants into "kinds of persons, abstract entities to be defined by a chart," the sentencing procedure called for by § 3553(a) allows judges, indeed commands them, to "consider the circumstances of the crime and of the defendant in their entirety and to form a judgment on that basis." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1263. In this regime, human judgment has supplanted mechanical calculation as the primary feature of the federal sentencing process.

At the same time, the statutory scheme in the post-*Booker* context avoids what were often seen as the critical deficiencies of the federal sentencing process before enactment of the SRA—its "failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge's exercise of discretion was informed by authoritative criteria and principles." *Id.* at 1254. To the contrary, § 3553(a) provides specific criteria for the sentencing court to consider. Those criteria include provisions aimed at ensuring that individualization does not result in the kinds of unjust

and unwarranted sentencing disparities that can be seen to mock the rule of law. See *Booker*, 543 U.S. at 264-65 (Breyer, J.) (observing that the system remaining after *Booker*, "while not the system Congress enacted," nonetheless works "to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary"). And, of course, as discussed in greater detail below, an integral part of the remedial majority opinion in *Booker* was its recognition that an appropriate role exists for appellate review in the sentencing process. *Id.* at 260-64. These features ensure that the sentencing process is one distinguished by appropriately *bounded* discretion. See *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) ("limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike"). It allows for individualized consideration without the risk of surrendering to arbitrariness or anarchy.

B. Applied as written, § 3553(a) calls for a sentencing process that preserves many of the virtues of the regime that existed before *Booker* while reining in (and potentially eliminating) many of its vices. It is unfortunate, therefore, that many courts of appeals—including the courts below in the present cases—have misinterpreted that provision by holding that there should be a presumption in favor of the reasonableness of a within-guideline sentence (or, similarly, by manufacturing a requirement that a substantial variance from the Guidelines can be justified only by "extraordinary circumstances"). Such contrivances are not supported by the post-*Booker* statutory scheme or by *Booker* itself. They are constitutionally problematic because they re-inject into the sentencing process the types of features that led the Court to hold in *Booker* that an enhanced guideline sentence based on facts not authorized by a jury verdict violates the Sixth Amendment. And from a practical perspective, they are simply not necessary to ensure the salutary goal of ensuring individualized sentencing while minimizing unwarranted sentencing disparities.

As an initial matter, the statutory text does not support either a rule that presumes the reasonableness of a guideline sentence or a standard that deems a variance from the guideline range reasonable only in extraordinary circumstances. Nothing in § 3553(a) even *hints* at giving an across-the-board preference for one of the factors it enumerates, be it the Guidelines or otherwise, over the rest. Indeed, the various opinions in *Booker* explicitly recognized that the statute affords no special weight to the Guidelines, but instead treats them merely as one element to be considered among a variety of others. See *Booker*, 543 U.S. at 259-60 (Breyer, J.) (§ 3553(a) "requires judges to take account of the Guidelines *together with other sentencing goals*") (emphasis added); *id.* at 300 (Stevens, J., dissenting in part) (the guideline range "is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a)"). Thus, as Justice Scalia observed, "under § 3553(a), [district judges] will need only to 'consider' that range as one of many factors," and the "*statute provides no order of priority among all those factors.*" *Id.* at 304-05 (Scalia, J., dissenting in part) (emphasis added).

Reading a pro-Guidelines presumption into the SRA is also decidedly at odds with the structure of the statute as it exists in its post-*Booker* form. The original Senate bill, introduced in 1977, called for a largely advisory guidelines system; "it directed the sentencing judge to consider a variety of factors, only one of which was the sentencing range established by the Guidelines, and subjected the ultimately chosen sentence to appellate review under a 'clearly unreasonable' standard." *Id.* at 293 n.12 (Stevens, J., dissenting in part). Subsequently, however, the Senate amended the bill to include a directive to the sentencing court to impose a guideline sentence unless there was an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission. Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 245. That provision, which of course became § 3553(b)(1), was added to the bill precisely in order to "set a

clear *presumption* favoring the Guideline sentence, requiring sentencing judges to sentence within the guideline range except in the rare case." *Id.* at 271 (emphasis added). As Senator Kennedy explained on the Senate floor, this provision was intended to "'make clearer the basic *presumptive* aspects of the guidelines.'" *Id.* at 245 (emphasis added) (quoting 124 CONG. REC. 383 (1978)). Now that *Booker* has excised § 3553(b)(1), the pro-Guidelines presumption embodied in that provision has necessarily evaporated.

Given the remedial holding in *Booker*, a presumption in favor of the reasonableness of a Guideline sentence could be justifiable only insofar as such a sentence is in fact likely in all cases to satisfy the requirements of § 3553(a). Cf. *Leary* v. *United States*, 395 U.S. 6, 36 (1969) (a presumption is "irrational" and "arbitrary" unless "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). But that premise cannot be proven. Indeed, it is utterly fanciful to assume that a guideline range is intended to correspond, or generally even will, with § 3553(a)'s overarching obligation of parsimony and its enumerated sentencing factors.

In the first place, Congress's decision to include the Guidelines as just one of seven enumerated factors is powerful evidence that the legislature never expected that consideration of the Guideline range alone would be sufficient either to discharge the procedural requirements of § 3553(a) or to achieve the kind of substantive sentencing result that the "sufficient, but not greater than necessary" language demands. Nor does the legislative history of the SRA give any hint that Congress viewed Guideline sentencing as the equivalent of parsimonious sentencing. Indeed, as discussed above, that history—including the tension between § 3553(b)(1) and § 3553(a) that was not resolved until *Booker* was decided—suggests quite the opposite.

For its part, the Sentencing Commission *could* have shaped the Guidelines with the parsimony directive in mind, but it has not done so. For example, notwithstanding § 3553(a)(1)'s unlimited reference to "the history and characteristics of the defendant," the Commission has significantly circumscribed a district judge's ability to consider, under § 3553(a)(4), a defendant's history and characteristics. The Commission has thus determined that certain factors are *never* relevant (a disadvantaged upbringing (§ 5H1.12); drug or alcohol dependence (§ 5H1.4); and economic hardship (§ 5K2.12)) and that other factors are relevant *only* in extraordinary circumstances (age (§ 5H1.1); education and vocational skills (§ 5H1.2); mental and emotional conditions (§ 5H1.3); physical condition (§ 5H1.4); employment record (§ 5H1.5); family ties and responsibilities (§ 5H1.6); and record of prior good works (§ 5H1.11)). See also *Koon* v. *United States*, 518 U.S. 81, 95-96 (1996) (describing factors as "forbidden," "discouraged," and "encouraged"). In practice, therefore, the aim of a Guidelines sentence was not to impose a sanction "that would best achieve any of the purposes of sentencing," or one that was sufficient but not greater than necessary to meet those objectives; instead, the purpose was "nothing more and nothing less than compliance with the Sentencing Guidelines." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1264.

C. Devices such as those created by the courts below also raise constitutional problems because they tend to fuse back together the two elements (judicial fact-finding and binding guidelines) that *Booker* decisively separated. See *Booker*, 543 U.S. at 233 (Stevens, J.). In other words, the decisions below limit judicial discretion without affording any role for the jury. That is simply not consistent with *Booker*. Although one or more Members of this Court might ultimately have preferred to leave in place a sentencing regime in which judges could continue to apply guidelines that would carry extra weight, the remedial majority plainly em-

phasized that "that is not a choice that remains open." *Id.* at 265 (Breyer, J.).

As *Booker* makes clear, a truly advisory guideline system is distinguished by the sentencing court's freedom to impose a sentence outside of the suggested guideline range. Thus, the departure authority in the Guidelines was insufficient to let them pass constitutional muster because "departures are not available in every case, and in fact are unavailable in most." *Id.* at 234 (Stevens, J.). That is also why the remedial majority excised § 3742(e), which required appellate courts to evaluate whether the sentence departed from the Guideline range based on a factor "not authorized under section 3553(b)," 18 U.S.C. § 3742(e)(3)(B)(ii). That provision used the appellate review function to constrain the ability of district courts to sentence outside of the guideline range and thus brought the Guidelines into conflict with the Sixth Amendment.

Against this backdrop, the "extraordinary circumstances" requirement adopted by the Eighth Circuit makes the Guidelines virtually indistinguishable from the unconstitutional sentencing regime struck down in *Blakely* v. *Washington*, 542 U.S. 296 (2004). Under that regime, as the Court explained in *Booker*, "the Washington statute allowed the judge to impose a sentence outside the sentencing range for 'substantial and compelling reasons.'" 543 U.S. at 234 (Stevens, J.). Because not every case presents substantial and compelling reasons for departing, the guideline range would in some instances be mandatory and thus incompatible with the Sixth Amendment. *Blakely*, 542 U.S. at 304. There simply is no valid constitutional distinction between a rule forbidding significant departures except in "extraordinary circumstances" and a rule forbidding departures except for "substantial and compelling reasons." Indeed, as in *Blakely*, the holding below that "the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances," Claiborne Pet. App. 3,

had the effect of making the non-Guideline sentence legally impermissible. As a result of the Eighth Circuit's newfangled rule, there is now a non-trivial set of cases in which an out-of-guideline sentence will be unavailable as a matter of law. That flies in the face of both *Blakely* and *Booker*.

III. "Reasonableness" Review Should Focus on Whether the District Court Has Considered Its Obligations Thoroughly, Articulated Its Reasons Fully, and Infused Every Aspect of Its Sentencing Determination with the Principle of Parsimony

The statute's text and structure should be the lodestar for defining and applying the "reasonableness" standard of review. After *Booker*, the obligation of a district judge is to impose an individualized sentence that "consider[s]" the various factors set forth in § 3553(a), giving those factors the weight the judge thinks appropriate in the circumstances, each one subject to the overarching requirement of parsimony. The purpose of appellate review in this scheme is simply, but importantly, to ensure that district courts do not stray unreasonably from those statutory requirements. Several important points about the nature of post-*Booker* reasonableness review follow from this basic understanding.

A. Whether a sentence is imposed within a guideline range, above the range, or below it, reasonableness review should involve the same criteria. Indeed, one of *Booker*'s central messages is that a sentence may no longer be insulated from meaningful appellate review merely because it falls within a particular numerical range. That was the situation before *Booker*, as a result of 18 U.S.C. § 3742.[4] Subsection (e) of that provision created a system of differential appellate review depending on whether a sentence was inside or

[4] It was also the situation before the enactment of the SRA, when any sentence within the *statutory* range was effectively unreviewable for severity. See *Koon* v. *United States*, 518 U.S. 81, 96 (1996). Procedural violations, of course, were subject to review on appeal.

outside the applicable guideline range. Sentences outside the range were subject to de novo review and could be invalidated if the court of appeals deemed the departure legally impermissible or "unreasonable." 18 U.S.C. § 3742(e)(3), (f). In contrast, sentences within the range could be invalidated only if they were imposed "in violation of law" (for example, if the district court erred in calculating the applicable range). 18 U.S.C. § 3742(e)(1). Under that regime, therefore, a sentence within a properly calculated Guideline range was effectively unreviewable, in the absence of procedural error or a misapprehension of the scope of discretion. See, *e.g.*, *United States* v. *Woodrum*, 959 F.2d 100, 101 (8th Cir. 1992) (per curiam); *United States* v. *Garcia*, 919 F.2d 1478, 1482 (10th Cir. 1990).

But no longer. In invalidating and excising § 3742(e), the remedial majority in *Booker* replaced that two-tiered approach to appellate review with a single "reasonableness" standard, one that, the Court explained, was to be applied "across the board." 543 U.S. at 263 (Breyer, J.). Thus, *Booker* collapsed the difference between sentences within and outside the applicable guideline range for the purpose of appellate review. The effect of this statutory surgery was to impose for *all* sentences a standard of appellate review that has, as an analogue, the reasonableness standard used to evaluate *out-of-guideline* sentences before the enactment of the PROTECT Act in 2003. See *id.* at 261.[5] A presumption of reasonableness has no place in this new regime, because its purpose and effect are to subject a within-guideline sentences to less searching scrutiny than a sentence that falls

[5] The PROTECT Act amended the SRA to provide, among other things, that an out-of-guideline sentence, even if not unreasonable by its own terms, could be reversed merely because the district court departed based on a factor "not authorized under section 3553(b)." Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 § 401(d)(1), 117 Stat. 670.

outside of the guideline range. That is inconsistent with the unitary standard of review that *Booker* requires.

B. Procedural correctness, supported by a proper statement of reasons, should be powerful evidence that a sentence is reasonable. Under § 3553(a), proper sentencing decisions entail the consideration of multiple elements. The mandate that a district court "shall consider" those elements is integral to ensuring that courts do not abuse the considerable discretion they have to fashion criminal sentences. The mandate, in other words, helps to ensure that sentences are the product of reasoned judgment, rather than mere whim. See *supra* II.A. And the importance of *using* reason is reinforced by the requirement of *giving* reasons. That is why the SRA requires a district court to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c).

Along with encouraging reasoned judgment, the procedural mandates in § 3553(a) and § 3553(c) improve the sentencing process by facilitating appellate review. After all, meaningful review of the reasonableness of a sentence imposed pursuant to a directive to consider a number of statutory factors is possible only to the extent that the district court actually provides some objective indication that it has indeed considered the statutory requirements. Cf. *United States* v. *Taylor*, 487 U.S. 326, 343 (1988) (observing that "thorough appellate review" of decisions made under the Speedy Trial Act requires that a district court "carefully express its decision . . . in terms of the guidelines specified by Congress"). If the district court's consideration process is extensive, is well-documented, and reflects precisely how the various § 3553(a) factors were considered in the context of the particular defendant's case, the appellate court should be most reluctant to condemn the resulting sentence as unreasonable.

On the other hand, an appellate court will have more justification in viewing as unreasonable a sentence that is not supported by well-stated reasons. Thus, if a district court imposes a sentence without a substantial and thorough expla-

nation of how it examined the sentencing factors specified in § 3553(a)—*e.g.*, a terse on-the-record statement, no written discussion—a reviewing court rightfully will have little confidence that the ultimate sentence is the kind of parsimonious and well-considered punishment required by the statute. Accordingly, "any sentencing decision that fails to thoroughly and thoughtfully address the congressional directives of section 3553(a) must be considered suspect." Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 143 (2006). This is not to say that a procedurally correct sentence should *invariably* be upheld. See II.C. *infra*. But it *is* to say that the fundamental task of an appellate court engaged in reasonableness review should be to ensure that the procedural requirements of § 3553(a) have been satisfied. The extent to which a district court imposes a procedurally correct sentence should, except in the rarest case, strongly correlate with whether the sentence is reasonable.

This approach to reasonableness review is further supported by "[d]ifferences in the institutional competence of trial judges and appellate judges." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). After all, it is a not particularly difficult for appellate courts to determine whether district judges have stated with sufficient clarity and thoroughness the factors that went into their decisions and the reasons that led them to impose the sentence that they ultimately selected. Such matters may readily be reviewed on a paper record. Indeed, "under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance." *Koon*, 518 U.S. at 98.

In contrast, it is far more taxing (and fraught with risk) for appellate courts to engage in a searching review of a district judge's subjective, discretionary act of selecting an individual sentence. As this Court has recognized:

> "Face to face with living witnesses the original trier of the facts holds a position of advan-

> tage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * * How can we say the judge is wrong? We never saw the witnesses * * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal."

Marshall v. *Lonberger*, 459 U.S. 422, 434 (1983) (quoting *Boyd* v. *Boyd*, 169 N.E. 632, 634 (N.Y. 1930)). Cf. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967) (noting that because trial courts have "firsthand knowledge of witnesses, testimony, and issues," they have a greater "'feel' for the overall case"). The institutional advantage of the district courts explains why, before the SRA was enacted, district courts were afforded broad discretion to impose sentences, and appellate review of substantive sentencing outcomes was virtually unavailable. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431-32 (1974). Indeed, this Court has held that "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams*, 503 U.S. at 205 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)).

Booker does nothing to disturb that basic principle. To the contrary, the "reasonableness" standard it adopted was in explicit contrast to the searching kind of appellate review of discretionary sentencing decisions that had been mandated in the PROTECT Act provision (18 U.S.C. § 3742(e)) invalidated by the remedial majority. See *Booker*, 543 U.S. at 260-61. That excision (subject to the other changes wrought by *Booker*) effectively returned the law to where it was when this Court said in *Williams* that, although the SRA "established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams*, 503 U.S. at 205. As this Court stated in *Koon*, "deference

[is] owed" to the district court because it is clearly the "'judicial actor * * * better positioned * * * to decide the issue in question.'" *Koon*, 518 U.S. at 99 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-60 (1988)).

C. Although reasonableness review should be defined largely by its insistence on procedural correctness, it is not without a substantive component. In some cases, the record may reflect that a sentencing result, although procedurally proper, is nonetheless arbitrary and capricious and manifestly irrational. Any time that a reviewing court questions the outcome, however, it runs the risk of substituting its judgment for the decision of the judicial officer who is in an institutionally superior position to determine the appropriate sentence. To minimize that risk, and to avoid the possibility that the courts of appeals will again devise standards (as the courts below did in the present case) that improperly limit the discretion of district courts, this Court should make clear that a sentence imposed in a procedurally correct manner is subject to reversal only if the reviewing court concludes that the sentence is arbitrary and capricious and manifestly irrational, or if, as we discuss next, the sentence runs afoul of the principle of parsimony.

D. Given the overarching parsimony command of § 3553(a), an appellate court engaged in substantive reasonableness review should ask itself the same fundamental question that Montesquieu, Beccaria, Bentham, and Norval Morris contemplated: Was the district court reasonable in concluding, or did it fail to ascertain, that the judgment of sentence represents the *least severe* punishment necessary to achieve the specified purposes of the criminal law? That is because "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing specified in § 3553(a)(2). *United States* v. *Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006). Just as the procedural mandate that a district court "shall consider" the prescribed sentencing factors must in-

form the appellate review process, so too must the normative mandate that the district court impose a parsimonious sentence. Accordingly, if the appellate court is *not* convinced that the district judge reasonably concluded that he or she imposed the least burdensome punishment that would have satisfied the specified purposes of punishment, the unparsimonious sentence should be vacated. In this way, appellate review plays an important role in ensuring that punishment is never imposed wastefully or gratuitously.

* * *

If the Court animates the concept of reasonableness review with the principles that we have discussed, FAMM believes that the federal sentencing process not only will comply with the law as written, but will also come closer to being a truly just and humane system of punishment. Respecting the statutory command of parsimony will foster and embody the importance of respecting the law as written. Requiring courts to consider carefully the various purposes of punishment and to explain their sentences openly and rationally ensures that individual circumstances will receive individualized consideration and that sentences will be based on the exercise of reason rather than caprice. And, finally, remembering that punishment requires moral justification, and that it imposes significant costs on individuals that must always be justified, ensures that all people—including criminal defendants—are treated as ends rather than as means.

CONCLUSION

The judgments of the courts of appeals in both 06-5618 and 06-5754 should be reversed.

Respectfully submitted.

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SUPREME COURT, U.S.

(6) (5)

Nos. 06-5618 and 06-5754

In the Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

VICTOR A. RITA, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-guideline sentences?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, save the two representing Petitioners in this matter. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts, and we represent thousands of individuals who are sentenced each year. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their attorneys and other staff. The issues presented in these cases are of obvious importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

As daily participants in federal sentencing, *amici* offer an accounting, both statistical and anecdotal, of sentencing practices in district and appellate courts after *United States v. Booker*, 543 U.S. 220 (2005). The sum of that accounting is troubling and drives our view that the Guidelines should not be accorded a presumption of reasonableness.

Our experience is that the presumption of reasonableness for within-guideline sentences reflects institutional resistance to *Booker*, and that the circuits that

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[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. S. Ct. Rule 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

have adopted it have lost sight of the fundamental rationale of *Booker* and of *Blakely v. Washington*, 542 U.S. 296 (2004). The Constitution forbids the equivalent of conviction without the fundamental components of the adversary system the Framers intended. After *Booker*, guideline ranges continue to be increased based on information that has not been charged, has not been proven, has not been subject to confrontation, and in many cases comes from unreliable sources. Under such circumstances, it is wrong to afford sentences that fall within guideline ranges a presumption of reasonableness, as seven courts of appeals do.

In turn, presumption circuits over-emphasize the role of the Guidelines in sentencing decisions. As a result, attempts by sentencing judges to take into account the good in a defendant's life history when imposing punishment, an exercise clearly contemplated by *Booker*, are rebuffed as contrary to the Guidelines' view that such considerations are to be discouraged, or are "not ordinarily relevant," or are not relevant at all. But these same circuits apply a different, highly deferential standard of review to sentences above guideline ranges. The use of multiple standards of review in presumption circuits is contrary to *Booker*, which held that sentences are to be reviewed for reasonableness "across the board." *Booker*, 543 U.S. at 263. Thus, presumption circuits have, *de facto*, adopted a system that "impose(s) Guideline-type limits upon a judge's ability to reduce sentences, but . . . [does] not impose those limits upon a judge's ability to *increase* sentences," a "one-way lever[]" that was flatly rejected by this Court. *Id.* at 266 (emphasis in original).

Because the presumption of reasonableness acts as a one-way ratchet and allows sentencing ranges based on unreliable factual determinations, it is contrary to *Booker* and should be rejected.

ARGUMENT

I. INSTITUTIONAL RESISTANCE HAS HINDERED IMPLEMENTATION OF *BOOKER*.

The discussion of post-*Booker* data and cases that follows in Parts II and III is illuminated by reviewing the political context that gave rise to the presumption of reasonableness. In the wake of *Booker*, the Sentencing Commission and the Department of Justice (DOJ) acted swiftly to advance the argument that the Guidelines should be presumed reasonable because they already incorporate all of the purposes and factors in 18 U.S.C. § 3553(a), and other congressional directives. While this argument was no more than *ipse dixit*, it took hold, and spawned the presumption of reasonableness.

A. The Sentencing Commission.

In the nearly two years since *Booker* was decided, it has yet to be mentioned in the *Guidelines Manual*. The Guidelines have been amended five times since January 12, 2005. Amendments adopted since *Booker* include changes, generally resulting in higher penalties, to a wide range of crime including child pornography, possession of steroids, copyright violations, firearms and immigration offenses. Some were made at the direction of Congress, many others came of the Commission's own accord. Some were "technical and conforming amendments to various

Guidelines" (*e.g.*, U.S.S.G. App. C, amends. 679-680), and others were passed to address "problematic areas" and "issues" pertaining to Guideline applications (*e.g.*, *id.*, amends. 684, 691, 692). Yet *Booker*, described as "the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta* [*v. United States*, 488 U.S. 361 (1989)],"[2] was left unaddressed.

This inattention to *Booker* in the *Guidelines Manual* is significant. The *Guidelines Manual* is the source of information used for guideline calculations. Guideline calculations remain a component of the sentencing process and have primary significance in presumption circuits. U.S.S.G. § 5K2.0 describes the Commission's approach to a sentencing judge's departure authority. Relying on 18 U.S.C. § 3553(b)(1), § 5K2.0 severely limits a court's authority to sentence below guideline ranges. However, 18 U.S.C. § 3553(b)(1) was severed and excised in *Booker*. Yet, § 5K2.0 remains in the *Guidelines Manual* intact, "advising" against departures except in the rarest of cases, even though that advice rests on a statute that was voided as unconstitutional. And that advice is invoked time and again against defendants in circuits that accord the Guidelines a presumption of reasonableness.

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[2] Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U. S. House of Representatives, March 16, 2006 (hereinafter "Testimony of Hinojosa, J., March 16, 2006"), available at http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf.

The Commission has acted to advance its position that *Booker* changed little. On February 10, 2005, the Commission offered testimony to the House Judiciary Committee's Subcommittee on Crime.[3] The Commission recognized an emerging conflict in the courts as to how to interpret *Booker*. One view would accord the Guidelines substantial weight in the sentencing process. The other would treat the Guidelines as one of a number of sentencing factors.[4] The Commission lined up with the former, asserting that "the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," and that the Commission "has considered the factors listed at § 3553(a)." Thus, the Commission argued, the Guidelines should be given "substantial weight" in the sentencing decision.[5] The Commission disseminated its position to

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[3] Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, February 10, 2005 (hereinafter "Testimony of Hinojosa, J., February 10, 2005"), available at http://www.ussc.gov/Blakely/bookertestimony.pdf

[4] The conflict referenced was that exemplified in *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) and *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

[5] Testimony of Hinojosa, J., February 10, 2005, *supra*, note 3.

judges, probation officers, and prosecutors across the country in training presentations and written materials.[6]

The very language used at the February 10, 2005, hearing soon appeared verbatim in an Eleventh Circuit opinion. "Indeed, the factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a)." *United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005).

On March 16, 2006, the Commission again appeared before the House Judiciary Committee's Subcommittee on Crime to propose a legislative response to *Booker* which would accord the Guidelines substantial weight. In support of its proposal, the Commission cited *Shelton* for the proposition that "the factors set forth in 3553(a)(2) . . . are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," asserting that "the sentencing guidelines embody all of the applicable sentencing factors for a given

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[6] U.S. Sentencing Commission, *Post-Booker Guidelines Training 2006*, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing Testimony of Hinojosa, J., February 10, 2005), on file with author; U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (Mar. 2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

offense and offender."[7] This tautology has provided the primary justification for the presumption of reasonableness.[8]

B. The Department of Justice.

After *Booker*, DOJ swiftly adopted policies "advocating the consistent application of the Sentencing Guidelines."[9] On January 28, 2005, a directive to line Assistant United States Attorneys was issued that said prosecutors (1) "must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases," (2) "must oppose" any sentence that "is below what the United States believes is the appropriate Sentencing Guidelines range," and (3) must report "sentences outside the appropriate Sentencing Guideline range."[10] At the same time, DOJ was looking to

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[7] Testimony of Hinojosa, J., March 16, 2006, *supra*, note 2.

[8] *See, e.g., United States v. Cage*, 451 F.3d 585 (10th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006); *United States v. Peach*, 356 F. Supp. 2d 1018, 1021 (D.N.D. 2005).

[9] Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_Jan_28_comey_memo_on_ booker.pdf.

[10] *Id.*

Congress for a legislative response to *Booker*.[11] The government favored a "topless" or "minimum" Guidelines approach. In the form proposed by DOJ to the House Judiciary Committee hearing on March 16, 2006, "the sentencing guidelines minimum would return to being mandatory and again have the force of law, while the guidelines maximum sentence would remain advisory."[12]

Congress has taken no action. However, the combination of the Commission's and DOJ's advancement of the view that the Guidelines already account for § 3553(a) factors, and periodic threats of a legislative "fix," has stymied the development of sentencing law faithful to the principles in *Booker*.[13]

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[11] *See* Testimony of Christopher A. Wray, Assistant Attorney General, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, February 10, 2005, available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf; Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech, Washington, D.C., June 21, 2005, available at http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm.

[12] Testimony of William W. Mercer, Principal Associate Deputy Attorney General, Before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006, at 7, available at http://judiciary.house.gov/media/pdfs/mercer031606.pdf.

[13] Examples of how judicial concern over a legislative response to *Booker* influences sentencing decisions are found in *United States v. Wilson*, 350 F. Supp. 2d 1269, 1287-88 (D. Utah 2005); *United States v. Jiménez-Beltre*, 440 F.3d 517 (1st Cir. 2006) (Howard, J.,

The idea that the Guidelines account for all of the § 3533(a) factors is a matter of continuing concern in the district courts. Representative of that concern is *United States v. Raby*, where the sentencing judge lamented that he could not consider the age, mental health, and employment record of the defendant in imposing sentence. The court observed:

> I may not consider [age] without going against a presumption that the guideline is reasonable that tells me I can't consider age, that you will be 60 when you get out of prison. So, I can't talk – I can't do that.
>
> * * *
>
> Should I consider the fact that he is different from a youth and has never been convicted of a crime until he is 42, I would be branching into an area that the Sentencing Guidelines and their policy judgments seem to circumscribe and prohibit.
>
> So, someone with a Category I at age 17 is the same as a Category I, no criminal history, at age 60. So, the fact you live a

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concurring); *United States v. Grigg*, 442 F.3d 560 (7th Cir. 2006); *United States v. Vazquez-Rivera*, ___ F.3d ____, 2006 WL 3593482 (1st Cir. Dec. 12, 2006); and *United States v. Lopez-Cerda*, SA-05-CR-057, Transcript of Sentencing (W.D. Tex. July 6, 2005), available at www.fd.org/Lopez-CerdaTranscript7.6.05.pdf.

> law-abiding life and have never been convicted of a crime is treated exactly the same when you're 60 as it is when you're 20 under the Guidelines.

United States v. Raby, CR No. 2:05-00003, Transcript of Sentencing 22-23 (S.D. W. Va. Sept. 27, 2006), available at www.fd.org/ RabyTranscript9.27.06.pdf.

On the issue of employment, the court offered:

> Mr. Raby has been employed full-time for his adult life. But the Guidelines say it's reasonable for me not to pay a bit of attention to that. I am not to pay any attention to the fact that he has been a contributing member of society, has worked and eared a living. I'm not supposed to pay any attention to that because, as the Government argues, that's all taken care of by the Guidelines; the Guidelines are always reasonable about that.
>
> So, somebody that doesn't do a darn thing, lives a life of sloth and disrepute with regard to their employment, at least, is treated exactly the same as someone who works hard all their life. And it's not relevant for sentencing if one is to be reasonable, presumptively reasonable under the Guidelines.

Id. at 24.

And on mental health and the right to allocute:

> So, the fact that there are mental and emotional conditions which are clear in this case and inherent in cases such as this are not anything I can think about.
>
> I can't even, I suppose, take into account in that regard, or at least the Guidelines – I don't know why we have the right of allocution. This man made what I consider to be an extremely sincere statement. He's been truthful all along. He admits his sick and perverted view of children. But he's there under oath today and promises that he would not do it again no matter how tempted he would be to view child pornography.

Id. at 25.

Such frustrated colloquies are not atypical. Were the assertion underlying the presumption of reasonableness valid, this would not happen. But it is not. The Guidelines do not incorporate other § 3553(a) factors because the Guidelines cannot account for "the vast range of human conduct potentially relevant to a sentencing decision." U.S.S.G. Ch. 1, pt. A(a), (b) (1987). They are "inescapably generalizations" that "say little about the 'history and characteristics'" of our clients, except insofar as they "prohibit consideration of certain individualized factors [and] discourage – except in 'exceptional cases' – consideration of other individualized factors." *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006)

(Lipez, J., dissenting). The presumption of reasonableness promotes Guideline calculations to a position more important than the lives of our clients, producing a body of troubling case law.

II. THE PRESUMPTION OF REASONABLENESS SKEWS APPELLATE REVIEW IN A MANNER INCONSISTENT WITH *BOOKER*.

A review of sentencing and sentencing appeal data post-*Booker* shows predictable trends. Defendants are denied meaningful sentencing consideration of their individual circumstances in presumption circuits. When judges attempt to take into account a defendant's life history in imposing below-guideline sentences in presumption circuits, the risk of reversal is astonishingly high; meanwhile, sentences above guideline ranges are rarely reversed. This happens because, contrary to *Booker*, presumption circuits apply differing standards of review to sentences within, below, and above the guideline range. The data and caselaw emphatically demonstrate this point.

A. Statistical Overview.

The gap between the rate of below-guideline sentences imposed by district courts in circuits that have returned the Guidelines to their presumptive status and that in circuits that have declined to do so has steadily widened. *See* Difference in Rates of Below-Guideline Sentences Imposed 1/12/05-11/27/06 (App. A-1). As of November 27, 2006, the rate in non-presumption circuits exceeded that in presumption circuits by 34.2%. *Id.* This gap is alarming and is clear evidence that, by presuming

that the Guidelines incorporate § 3553(a) purposes and factors when they do not, courts deny defendants consideration of mitigating life circumstances in the sentencing decision.

As dramatic as is this gap between below-guideline sentences imposed in presumption and non-presumption circuits, the pattern in the courts of appeals is even more disturbing. Below-guideline sentences appealed by the government were reversed in 78.3% of cases. In contrast, above-guideline sentences appealed by defendants were reversed in only 3.5% of cases, and within-guideline sentences appealed by defendants were reversed in a mere 1.4% of cases. *See* Court of Appeals Review 12/1/05-11/30/06 (hereinafter "Court of Appeals Review"), App. A-5, A-8.[14] Thus, any newfound discretion that judges may have appears to be "an escalator that only goes up," *United States v. McDonald*, 461 F.3d 948, 959 (8th Cir. 2006) (Bye, J., dissenting), creating unwarranted disparity, *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (Heaney, J., concurring), contrary to this Court's rejection of such one-way levers. *Booker*, 543 U.S. at 266.

In presumption circuits, 86.2% of below-guideline sentences appealed by the government were reversed, as compared to 60% in non-presumption circuits. Court of

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[14] The entire compilation of appeals court decisions used in preparing the comparative analyses included in the Appendix at A-5 – A-17 is posted at Court of Appeals Review 12/1/05–1/30/06, available at www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf.

Appeals Review, App. A-10. In the Fourth Circuit, where Victor Rita was sentenced, 100% of below-guideline sentences were reversed and 100% of within-guideline sentences were affirmed. In the Eighth Circuit, where Mario Claiborne was sentenced, 92.9% of below-guideline sentences were reversed and 98.8% of within-guideline sentences were affirmed. *Id.*, App. A-9.

The presumption circuits attempt to distinguish the post-*Booker* presumption of reasonableness from the presumptive guideline system held unconstitutional in *Booker* by claiming that it does not mean that a sentence *outside* the guideline range is presumptively *unreasonable*. *See, e.g., United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006); *United States v. Hayes*, 2006 WL 3456383, at *1 (4th Cir. Nov. 30, 2006) (unpublished). Statistical analysis of the decisions of presumption circuits belies that contention. Over 20% of outside-guideline sentences have been reversed, while less than 1% of within-guideline sentences have been reversed. *See* Court of Appeals Review, App. A-10. This is significantly different than the treatment of appeals of outside-guideline sentences in non-presumption circuits, where only 8.7% were reversed. *Id.*

Given the widespread view among the judiciary that the Guidelines do not comply with 18 U.S.C. § 3553(a), produce sentences that are too severe, and fail to allow individualized sentencing,[15] one would expect to see a very

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[15] *See* U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary ES-1-8 (Feb. 2003), available at http://www.ussc.gov/judsurv/judsurv.htm.

different trend were the law faithfully being followed. Instead, the pattern of appellate guideline enforcement and the periodic demands for a legislative fix, *see* nn. 7, 11-12 and accompanying text, *supra*, have "preserve[d] *de facto* mandatory Guidelines by discouraging district courts from sentencing [below] Guidelines ranges" and from following the sentencing law. *See Booker*, 543 U.S. at 313 (Scalia, J., dissenting in part).

B. Multiple Standards of Appellate Review.

The presumption circuits employ differing standards of review depending on whether the appeal is from a sentence within, below, or above the guideline range. The differing standards have the effect of enforcing the guideline range as under pre-*Booker* law, but are far more permissive of above-guideline sentences than under pre-*Booker* law. This stands the parsimony requirement of § 3553(a) on its head,[16] is contrary to the command in *Booker* that one standard of review – for "unreasonableness" – be applied "across the board," *Booker*, 543 U.S. at 263, and "irrespective of whether the trial judge sentences within or outside the Guidelines range," *id.* at 260, and operates as the one-way lever this Court found to be incompatible with congressional intent, *id.* at 266.

When reviewing within-guideline sentences, the presumption circuits begin with the proposition that a within-guideline sentence incorporates the purposes of

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[16] "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a).

sentencing and all relevant factors set forth in § 3553(a). *See United States v. Cage*, 458 F.3d 537, 542-43 (6th Cir. 2006); *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006); *accord United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 517-18 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005).[17] If the guideline range was calculated correctly, affirmance inexorably follows. *See, e.g., United States v. Davis*, 2006 WL 3267349, at *1 (4th Cir. Nov. 13, 2006) (unpublished); *United States v. Favorite*, 2006 WL 3231470, at *1 (5th Cir. Nov. 8, 2006) (unpublished); *United States v. Gonzalez*, 2006 WL 3375360, at *1 (7th Cir. Nov. 22, 2006) (unpublished); *United States v. Humphrey*, 2006 WL 3257883, at *2 (8th Cir. Nov. 13, 2006) (unpublished); *United States v. Lopez-Flores*, 444 F.3d 1218, 1222-23 (10th Cir. 2006).

Review of below-guideline sentences, however, is difficult to distinguish in substance from *de novo* review of downward departures as before *Booker*. In derogation of § 3553(a)'s express command that the district court "shall consider" the history and characteristics of the defendant and the circumstances of the offense in determining what

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[17] The D.C. Circuit has merely said that it adopts a presumption of reasonableness as its sister circuits have done. *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir.), *cert. denied*, 2006 WL 3037643 (U.S. Nov. 27, 2006).

"particular sentence" is sufficient but not greater than necessary to satisfy the purposes of sentencing, presumption circuits preclude or strongly discourage consideration of such factors based on the *Guidelines Manual*'s policy statements. *See, e.g., United States v. Simmons*, ___F.3d ____, 2006 WL 3365654, at *14-15 (5th Cir. Nov. 21, 2006) (cautioning in its "supervisory capacity as well as to assist the district court on remand," that while the sentencing court originally considered the age of the defendant, it should be aware of the Guidelines policy statement that age "is not ordinarily relevant" and must be prepared to "explain why the prohibited or discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should *not* apply") (emphasis in original); *United States v. Duhon*, 440 F.3d 711, 716-17 & n.4 (5th Cir. 2006) (below-guideline sentence unreasonable because it "deviates from a relevant advisory Guideline disallowing probation" and so "varies, not only from the applicable guideline range, but also from the 'kinds of sentence' available under the Guidelines"; it "diverges from a policy statement prohibiting the consideration of physical condition"; and it "should have similarly addressed the policy statement discouraging [family circumstances] as a ground for departure"); *United States v. Hodge*, ___ F.3d ____, 2006 WL 3373113, at *5 (8th Cir. Nov. 22, 2006) (drug addiction is an "improper or irrelevant" factor because it is prohibited by U.S.S.G. § 5H1.4, p.s.); *United States v. Beal*, 463 F.3d 834, 837 (8th Cir. 2006) (variance from career offender guideline based on the fact defendant had never served any jail time was error because U.S.S.G. § 4A1.3, p.s., prohibits more

than one point off a career offender sentence); *United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (vacating sentence based on defendant's role as sole caretaker for two young children because a departure for family ties and responsibilities would not have been allowed under the Guidelines).

Moreover, the presumption circuits sometimes directly substitute their own judgment for that of sentencing judges, ordering specific sentences to be imposed on remand. *See, e.g., United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006) ("remand[ing] for resentencing at the low end of the sentencing range (seventy-eight months) on Count Two and to a consecutive sixty-month sentence on Count Three"), *petition for cert. filed* June 20, 2006 (No. 05-11659) ; *United States v. Thorpe*, 447 F.3d 565, 569 (8th Cir. 2006) (remanding for "a determination of the drug quantity under a preponderance of the evidence standard" and "for the imposition of a sentence commensurate with the drug quantity determination").

When reviewing below-guideline sentences, presumption circuits consistently require a more compelling reason the further a below-guideline sentence "varies," "diverges," or "deviates" from the guideline range. *See, e.g., Claiborne*, 439 F.3d at 481; *United States v. Hayes*, 2006 WL 3456383, at *1 (4th Cir. Nov. 30, 2006) (unpublished); *United States v. Davis*, 458 F.3d 491, 496 (6th Cir. 2006); *Cage*, 451 F.3d at 594-95; *Duhon*, 440 F.3d at 715; *United States v. Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005), *cert. denied*, 2006 WL 985745 (U.S. Apr. 17, 2006); *United States v. Dean*, 414 F.3d 725,

729 (7th Cir. 2005). This standard requires sentences that are closely tethered to the guideline range but bear no relation to the purposes of sentencing applied with parsimony.

In sharp contrast is the perfunctory review applied by presumption courts to above-guideline sentences. Sentences that admittedly create unwarranted disparity and overstate the seriousness of the offense, and would be reversed if below the guideline range, are left undisturbed. *See, e.g.*, *United States v. Reinhart*, 442 F.3d 857, 864 (5th Cir.) (concluding sentence 84 months above top of guideline range was reasonable though sentencing court "did not consider the need to avoid unwarranted sentence disparities among similarly-situated defendants . . . [and defendant's] sentence is undoubtedly longer than that received by other similar defendants"), *cert. denied*, 127 S. Ct. 131 (2006); *United States v. Saldana*, 427 F.3d 298, 316 (5th Cir.) ("[g]iven the deference we owe to the district court, we will not overturn the extent of the [400%] upward departure here as unreasonable" though it "overstates the harm done to the victims" and "is significantly longer than those imposed in similar 'tax protestor' cases"), *cert. denied*, 126 S. Ct. 810 (2005); *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006) (affirming 300% increase above guideline range based on factors already taken into account by the criminal history rules because a "defendant's criminal history is one of the factors that a court may consider in imposing a non-Guideline sentence" and rejecting defendant's argument that the sentence was unreasonable because of unwarranted disparity).

As Judge Bye of the Eighth Circuit observed: "In this [above-Guideline] case, the district court only perfunctorily indicated it had 'considered' the § 3553(a) factors. If we pretend, for a moment, this case were one in which the Guidelines called for a sentence of twenty-four months at the low end of the advisory range, and the district court had departed *downward* 400% to six months, with the same spare comments about consideration of the § 3553(a) factors, I seriously doubt the district court's decision would have survived our appellate review." *United States v. Zeigler*, 463 F.3d 814, 820-21 (8th Cir. 2006) (Bye, J., concurring) (emphasis in original).

The Seventh Circuit has issued a warning to defendants that appeals of within- and above-guideline sentences are "frivolous." *United States v. Bullion*, 466 F.3d 574, 575 (7th Cir. 2006) (defendant's appeal of 264-month sentence, which was 39 months above top end of the guideline range, was "frivolous," and "[t]here was no basis for the defendant's challenging the exercise of discretion by the sentencing judge in this case – and, we add in cases like it"); *United States v. Gonzalez*, 462 F.3d 754, 755 (7th Cir. 2006) (asking defendants not to "confuse a debatable sentence with an unreasonable one and . . . waste their time and ours by filing frivolous appeals"). No such warning has been issued to the government regarding below-guideline sentences. Instead, the Seventh Circuit carefully scrutinizes and frequently reverses those sentences. *See, e.g., United States v. Wallace*, 458 F.3d 606, 612-14 (7th Cir. 2006); *United States v. Pisman*, 443 F.3d 912, 920 (7th Cir.), *cert. denied*, 127 S. Ct. 413 (2006).

In addition, some presumption circuits have produced two different statements of the law depending on whether the sentence was above or below the guideline range. Affirming an *above*-guideline sentence, the Eighth Circuit rejected the argument "that the range of reasonableness is essentially co-extensive with the Guidelines range" because such a rule "would effectively render the Guidelines mandatory." *United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005). Later, reversing a *below*-Guideline sentence, the Eighth Circuit concluded that the Guidelines are presumptively reasonable because they "are fashioned taking the other [18 U.S.C.] § 3553(a) factors into account and are the product of years of careful study." *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006). The Fifth Circuit, too, uses remarkably different language to describe its review depending on whether the sentence was above or below the guideline range. *Compare Reinhart*, 442 F.3d at 864 (affirming above-guideline sentence because the "guidelines are merely one sentencing factor among many," and "we therefore decline to give the guidelines the quasi-mandatory status urged by Reinhart") *with Duhon*, 440 F.3d at 717-21 (reversing below-guideline sentence because district court improperly relied on factors prohibited and discouraged by the Guidelines' policy statements "without explaining its deviation").

The data and case review above demonstrate that according a presumption of reasonableness to within-guideline sentences has the effect of subjecting below-guideline sentences to strict scrutiny tied to the Guidelines' range and policy statements, as under the standard of

review for departures excised in *Booker*. In contrast, within-guideline sentences are nearly automatically affirmed. This is inconsistent with the unitary standard of review that *Booker* requires.

III. THE GUIDELINE RANGE IS UNWORTHY OF A PRESUMPTION OF REASONABLENESS BECAUSE, UNDER THE GUIDELINES' RELEVANT CONDUCT RULES AND PROCEDURAL ADVICE, THE GUIDELINE RANGE FREQUENTLY RESTS ON AN UNRELIABLE FACTUAL BASIS.

As experience makes plain, guideline calculations are often the product of unreliable, untested and unwarranted factual assumptions. This happens because the Guidelines require the use of a broad sweep of information to calculate the sentencing range without adequate procedural protections. The use of factually unreliable information to compute sentencing ranges is a constant risk and common occurrence. Such calculations are not worthy of a presumption of reasonableness.

Under U.S.S.G. § 1B1.3, applicable to the majority of cases sentenced in federal court today, and a host of cross-references like that applied in Victor Rita's case, the Guidelines require that uncharged, dismissed and acquitted offenses, often far afield of the offense of conviction, be used to calculate the guideline range.[18] That calculation is

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[18] *See, e.g., United States v. Rashaw*, 170 Fed. Appx. 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double

to be based on a preponderance of the "probably accurate" information, including hearsay. U.S.S.G. § 6A1.3, p.s. & comment (backg'd.). Seven courts of appeals attribute a presumption of reasonableness to the range thus "correctly calculated." *See, e.g., United States v. Romero*, ___ F.3d ____, 2006 WL 3530656, at *6, *9 (7th Cir. Dec. 8, 2006); *United States v. Smith*, 2006 WL 3068667, at *1 (5th Cir. Oct. 26, 2006) (unpublished); *United States v. Minter*, 2006 WL 3018109, at *1 (4th Cir. Oct. 23, 2006) (unpublished).

All courts of appeals have approved the use of uncharged, dismissed and acquitted separate offenses when determining the guideline range.[19] Most have held that in

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homicide to which firearms were unrelated); *United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006) (affirming sentence for defendant convicted of distribution of cocaine based on distribution of ecstasy and firearms offense of which he was acquitted); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted); *United States v. Jardine*, 364 F.3d 1200 (10th Cir. 2004) (affirming 108-month sentence for defendant convicted of firearms possession subject to 18-24 month guideline sentence based on uncharged drug trafficking offense to which the firearm was unrelated).

[19] *See, e.g., United States v. Andreano*, 417 F.3d 967, 970 (8th Cir. 2005); *United States v. Fanfan*, 468 F.3d 7, 15 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2006); *United States v. Clark*, 179 Fed. Appx. 870, 871-72 (3d Cir. 2006); *United States v. Stewart*, 185 Fed. Appx. 276, 279 (4th Cir. 2006); *United States v. Angleton*, 2006 WL 2828657, at *1, *4 (5th Cir. Sept. 28,

doing so, a preponderance of the evidence standard may be used. At least one has held that a preponderance of the evidence standard *must* be used. *See United States v. Thorpe*, 447 F.3d 565, 569 (8th Cir. 2006) (vacating sentence based on drug quantity found by the jury beyond a reasonable doubt and remanding "for a determination of the drug quantity under a preponderance of the evidence standard and for the imposition of a sentence commensurate with the drug quantity determination"). Before and after *Booker*, hearsay may be used at sentencing,[20] and several courts of appeals treat the mere inclusion of allegations in a presentence report as evidence that may be used in calculating the guideline range unless the defendant comes forward with evidence to rebut the hearsay.[21]

2006) (unpublished); *United States v. Barevich*, 443 F.3d 956, 958-59 (7th Cir. 2006); *United States v. Flores-Flores*, 2006 WL 2269879, at *1 (9th Cir. Aug. 2, 2006) (unpublished); *United States v. Magallenez*, 408 F.3d 672, 678-79 (10th Cir. 2006); *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006).

[20] *See United States v. Littlesun*, 444 F.3d 1196, 1198-1200 (9th Cir. (2006); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005).

[21] *See United States v. Caldwell*, 448 F.3d 287, 290-91 (5th Cir. 2006); *United States v. Daniel*, 178 Fed. Appx. 345, 346 (5th Cir. 2006); *United States v. Bobadilla-Diaz*, 176 Fed. Appx. 858, 859 (9th Cir. 2006); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997);

These guideline-endorsed procedures and applications produce calculations that are routinely based on estimation and surmise rather than evidence. *See, e.g.*, *United States v. Jackson*, ___ F.3d ____, 2006 3436038, at *3, *9 (6th Cir. Nov. 30, 2006) (upholding as "reasonable" drug quantity "estimate" based on weighing four of eighteen pieces of crack cocaine); *United States v. Perez*, 183 Fed. Appx. 477, 479-80 (5th Cir. 2006) (upholding as "reasonable" probation officer's "extrapolation" of drug quantity by multiplying quantity of marijuana seized by number of times defendant crossed border).

And the information comes from untrustworthy and unchallengeable sources. As a typical example, a defendant pled guilty in the Northern District of Texas to conspiring to import more than 5 kilograms of cocaine and more than 1000 kilograms of marijuana. The presentence report, restating hearsay provided by the government, said the defendant was accountable for 155 kilograms of cocaine and 19,282 pounds of marijuana. *See* Brief of Appellant, *United States v. Murietta-Maldonodo*, 111 Fed. Appx. 253 (5th Cir. 2004) (No. 04-10177), available at 2004 WL 2966797, at *4. At the sentencing hearing, an agent testified that he was told the defendant "had a connection in California who supplied him with 25 kilograms of cocaine," admitted that he had no means of verifying the information and "that's as far as we went with it." *Id.* at *8-*9. The agent also testified that a cooperating witness had attributed 21 van loads of

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United States v. Terry, 916 F.2d 157, 160-62 (4th Cir. 1990).

marijuana to the defendant, and that another source, whose identity the agent would not disclose, had attributed another 10 to 20 van loads to the defendant. *Id.* at *5-*6.

Before *Booker*, the Fifth Circuit rejected the defendant's argument that the full quantity alleged in the presentence report used to sentence him to 327 months in prison was not supported even by a preponderance of reliable evidence, holding that the *defendant* "has not shown that the information in the Presentence Report (PSR) concerning the drug quantities involved in the offense was 'materially untrue, inaccurate, or unreliable.'" *United States v. Murietta-Maldonado*, 111 Fed. Appx. 253, 254 (5th Cir. 2004) (internal citations omitted). After *Booker*, the same sentence was held to be reasonable because when a judge "impose[s] a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Murietta-Maldonado*, 161 Fed. Appx. 374, 375 (5th Cir. 2006) (internal citations omitted).[22]

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[22] *See also United States v. Taylor*, 184 Fed. Appx. 870 (11th Cir.) (affirming life sentence based on uncharged murder over defendant's objections to the use of hearsay and a preponderance of the evidence standard), *cert. denied*, 127 S. Ct. 311 (2006); *United States v. Patterson*, 2006 WL 2620174 (4th Cir. Sept. 13, 2006) (unpublished) (affirming 262-month sentence under cross-reference to first degree murder guideline for defendant convicted of conspiracy to possess crack with intent to distribute, based on finding by a preponderance that the defendant participated in a home invasion which resulted in death, though the jury acquitted him of participating in a firearms conspiracy factually based on the home

Such reasoning turns a blind eye to the traditional view that untested statements by self-interested witnesses are inherently unreliable. Recently a district judge took aim at this problem. In overturning the convictions of a mother and her sons obtained through false and collusive "snitch testimony," Judge Melancon found that the use of such testimony is "systemic," and called upon the Department of Justice to conduct an independent investigation into the problem. *See United States v. Colomb*, No. 02-CR-60015, Order Ruling on Defendant's Motion for New Trial (W.D. La. Aug. 31, 2006), available on PACER, Docket No. 531; *see also United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) ("In truth, [the] 'real conduct' . . . system relies on 'findings' that rest on a mishmash of data, including blatantly self-serving hearsay largely served up by the Department [of Justice].") (internal quotation marks and citations omitted). The Sentencing Commission itself has recognized the unreliability of the information often used to establish relevant conduct and the hidden disparity it creates. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50 (Nov. 2004) ("research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators"), available at http://www.ussc.gov/15_year/15year.htm.

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invasion).

A presumption of reasonableness at least dissuades and at worst prohibits sentencing judges from blunting the impact of unreliable information on the ultimate sentence. *See United States v. Thorpe*, 447 F.3d 565, 567-68 (8th Cir. 2006) (district court erred by imposing sentence based on drug quantity found by the jury because of its discomfort with the severity of controlled substance laws and how little the government must prove in conspiracy cases). The presumption creates yet another system, like those struck down in *Blakely* and *Booker*, in which the equivalent of conviction is obtained absent the fundamental components of the adversary system the Framers intended. *See Blakely v. Washington*, 542 U.S.296, 305-08, 311-13 (2004); *United States v. Booker*, 543 U.S. 220, 230-44 (2005); *id.* at 273 (Stevens, dissenting in part); *id.* at 304 (Scalia, J., dissenting in part); *id.* at 319 n.6 (Thomas, J., dissenting in part); *see also Washington v. Recuenco*, ___ U.S. ____, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) ("In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments.").

Without procedures sufficient to assure the reliability of the wide range of information a sentencing judge must consider in calculating the guideline range, a presumption of reasonableness is unwarranted and at odds with the holdings in *Blakely* and *Booker*.

CONCLUSION

According a presumption of reasonableness to within-Guideline sentences is inconsistent with *Booker* and the judgments of the courts of appeals in both No. 06-5618 and No. 06-5754 should be reversed.

Respectfully submitted,

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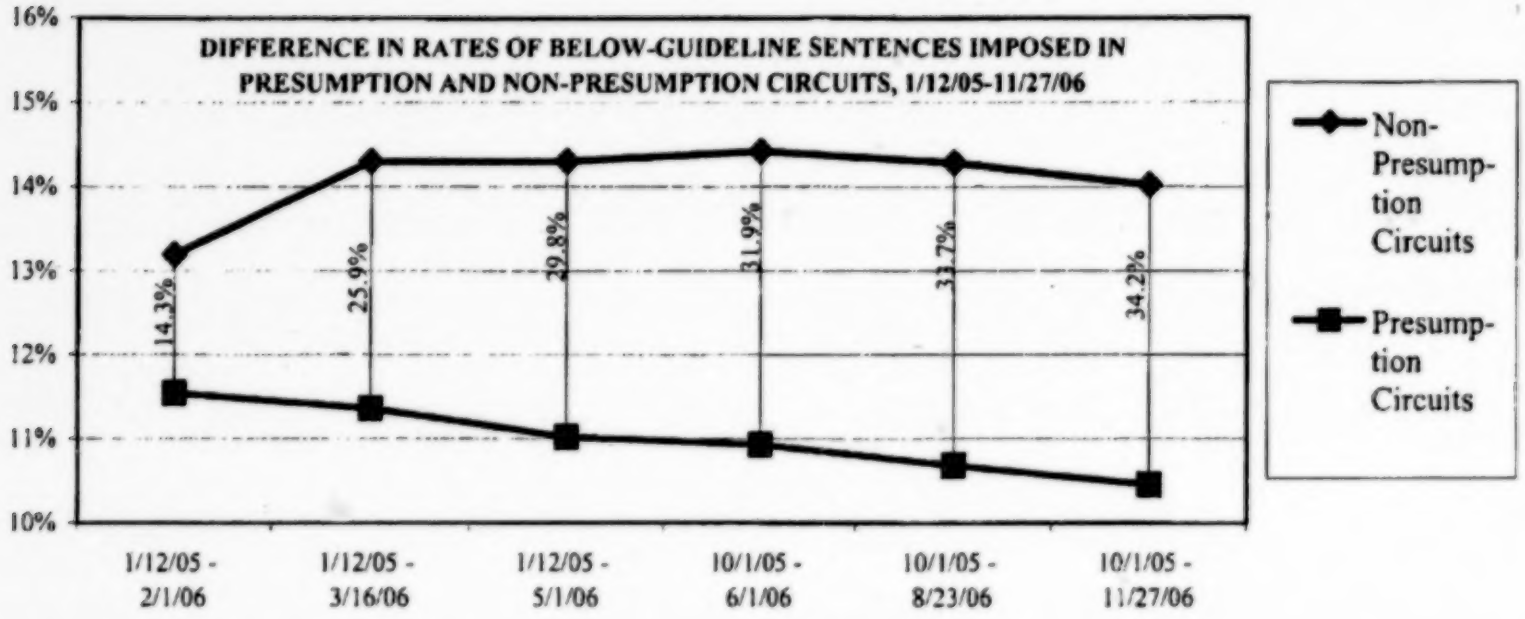
December 18, 2006

APPENDIX



The data used to prepare this chart was taken from the following reports: U.S. Sentencing Commission, Post-Booker Sentencing Updates, published Feb. 14, 2006, Mar. 30, 2006, May 24, 2006, July 11, 2006; Quarterly Sentencing Updates, published Aug. 30, 2006 and Dec. 6, 2006, available at http://www.ussc.gov/bf.htm. The lower line represents the number of below-guideline sentences imposed divided by the number of cases sentenced in circuits that had adopted a presumption of reasonableness before or during the respective period. The upper line represents the number of below-guideline sentences imposed divided by the number of cases sentenced in circuits that had not adopted a presumption of reasonableness before or during the respective time period. The percentage shown on the vertical line at each time period is the percentage by which the rate of below-guideline sentences for the circuits that had not adopted a presumption exceeded the rate of below-guideline sentences for the circuits that had adopted a presumption. The seven circuits to adopt a presumption did so in the following cases: *U.S. v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005), *U.S. v. Lincoln*, 413 F.3d 716 (8th Cir. July 7, 2005), *U.S. v. Mykytiuk*, 415 F.3d 606 (7th Cir. July 7, 2005), *U.S. v. Williams*, 436 F.3d 706 (6th Cir. Jan. 31, 2006), *U.S. v. Green*, 436 F.3d 449 (4th Cir. Feb. 6, 2006), *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. Feb. 17, 2006), *U.S. v. Dorcely*, 454 F.3d 366 (D.C. Cir. July 21, 2006).

BELOW GUIDELINE SENTENCES IMPOSED/CASES SENTENCED 1/12/2005-11/27/2006

Period	Nat'l	DC	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
1/12/05-2/1/06	7951	61	258	870	536	688	1237	681	438	751	1326	498	607
	63631	472	1449	3768	3052	5679	14357	4902	2847	4809	11226	5197	5873
1/12/05-3/16/06	9328	70	303	1024	606	817	1415	788	508	830	1608	626	733
	74245	544	1705	4329	3459	6638	16643	5653	3320	5485	13303	6122	7044
1/12/05-5/1/06	10591	76	338	1331	687	904	1522	909	562	924	1806	705	827
	85568	612	1990	5661	3933	7622	19060	6496	3754	6255	15123	6964	8098
10/1/05-6/1/06	4877	39	127	616	293	405	646	440	244	452	873	382	360
	39508	272	939	2436	1739	3451	8866	3005	1760	3082	6947	3342	3669
10/1/05-8/23/06	6014	49	154	800	345	468	806	532	302	520	1109	475	454
	49560	345	1169	3122	2135	4397	11069	3651	2162	3676	8972	4213	4649
10/1/05-11/27/06	7935	68	210	983	450	598	1084	734	402	665	1463	646	632
	66802	449	1524	4012	2880	6007	15142	4918	2909	4972	11893	5748	6348

Source: U.S. Sentencing Commission, Post-Booker Sentencing Updates, published Feb. 14, 2006, Mar. 30, 2006, May 24, 2006, July 11, 2006; Quarterly Sentencing Updates, published Aug. 30, 2006 and Dec. 6, 2006, available at http://www.ussc.gov/bf.htm.

Presumption adopted shown in bold: *U.S. v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005), *U.S. v. Lincoln*, 413 F.3d 716 (8th Cir. July 7, 2005), *U.S. v. Mykytiuk*, 415 F.3d 606 (7th Cir. July 7, 2005), *U.S. v. Williams*, 436 F.3d 706 (6th Cir. Jan. 31, 2006), *U.S. v. Green*, 436 F.3d 449 (4th Cir. Feb. 6, 2006), *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. Feb. 17, 2006), *U.S. v. Dorcely*, 454 F.3d 366 (D.C. Cir. July 21, 2006).

DATA POINTS

Period	Non-Presumption Circuits	Presumption Circuits	Difference Between Presumption and Non-Presumption
1/12/05 - 2/1/06	13.2%	11.5%	14.3%
1/12/05 - 3/16/06	14.3%	11.4%	25.9%
1/12/05 - 5/1/06	14.3%	11.0%	29.8%
10/1/05 - 6/1/06	14.4%	10.9%	31.9%
10/1/05 - 8/23/06	14.3%	10.7%	33.7%
10/1/05 - 11/27/06	14.0%	10.5%	34.2%

RATES OF BELOW-GUIDELINE SENTENCES IMPOSED 1/12/05-11/27/06 - DATA

Period	Nat'l	DC	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Pre-sump-tion Circuits	Pre-sump-tion %	Non-Pre-sump-tion Circuits	Non-Pre-sump-tion %	Nat'l %
1/12/05-2/1/06	7951	61	258	870	536	688	1237	681	438	751	1326	498	607	3107	11.54	4844	13.19	12.50
	63631	472	1449	3768	3052	5679	14357	4902	2847	4809	11226	5197	5873	26915		36716		
1/12/05-3/16/06	9328	70	303	1024	606	817	1415	788	508	830	1608	626	733	4984	11.36	4344	14.30	12.56
	74245	544	1705	4329	3459	6638	16643	5653	3320	5485	13303	6122	7044	43861		30384		
1/12/05-5/1/06	10591	76	338	1331	687	904	1522	909	562	924	1806	705	827	5526	11.02	5065	14.30	12.38
	85568	612	1990	5661	3933	7622	19060	6496	3754	6255	15123	6964	8098	50151		35417		
10/1/05-6/1/06	4877	39	127	616	293	405	646	440	244	452	873	382	360	2569	10.93	2308	14.42	12.34
	39508	272	939	2436	1739	3451	8866	3005	1760	3082	6947	3342	3669	23506		16002		
10/1/05-8/23/06	6014	49	154	800	345	468	806	532	302	520	1109	475	454	3152	10.68	2862	14.28	12.13
	49560	345	1169	3122	2135	4397	11069	3651	2162	3676	8972	4213	4649	29513		20047		
10/1/05-11/27/06	7935	68	210	983	450	598	1084	734	402	665	1463	646	632	4197	10.45	3738	14.02	11.88
	66802	449	1524	4012	2880	6007	15142	4918	2909	4972	11893	5748	6348	40145		26657		

COURT OF APPEALS REVIEW

12/1/05-11/30/06

The following analysis covers the period December 1, 2005 through November 30, 2006. It includes published and unpublished decisions in the Westlaw database responsive to the following search: "SENTENCING GUIDELINES" & DA(AFT 11/30/2005 & BEF 12/1/2006) & (REASONABLE! UNREASONABLE! 3553(A) ADVISORY). It includes only cases in which either the government or the defendant appealed the sentence on the basis of it being unreasonable under 18 U.S.C. § 3553(a) (including appeals on the basis that the district court failed adequately to articulate reasons for the sentence imposed), or in which the court of appeals addressed the reasonableness of the sentence *sua sponte*.

Parameters were established to ensure consistency. Appeals based solely on a claimed error in calculating the guideline range or clear error in fact-finding in support of the guideline range were not included (even if a party or the court said that for that reason, the sentence was unreasonable). Appeals of a grant, denial or extent of a departure described in the Guidelines Manual were included. Cases in which 18 U.S.C. § 3553(a) played no role because a mandatory minimum statute dictated the sentence were not included. Cases involving sentences imposed before *Booker* was decided were not included unless the court of appeals determined not only whether there was *Booker* error (including plain error), but whether

the sentence was reasonable. Fines, terms of supervised release, and sentences for supervised release and probation violations that met the above parameters were included.

Each case meeting the above parameters was coded according to whether the sentence imposed was within, above or below the guideline range, the party who appealed, and the result of the appeal. Multi-defendant cases were counted for each sentence meeting the above parameters, as were cases in which a defendant had more than one type of sentence meeting the above parameters (*e.g.*, a within-guideline prison term for the instant offense and an above-guideline prison term for revocation of supervised release or probation that had been imposed for a prior offense). The categories are:

1. Within-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

2. Within-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

3. Above-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

4. Above-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

5. Below-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

6. Below-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

Of the 1,534 sentences identified through the above search parameters, 1,049 were appeals from within-guideline sentences, 254 were appeals from above-guideline sentences, and 231 were appeals from below-guideline sentences. The following charts compare the information obtained from a review of those cases. A document that includes the charts below and the entire list of cases is posted at:

www.fd.org/CourtofAppealsReview12.1.05-11.30.06.

NATIONAL RESULTS

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	1034 / 1049 (98.6 %)	15 / 1049 (1.4 %)	Within Guideline	0/0	0/0
Above Guideline	245 / 254 (96.5 %)	9 / 254 (3.5 %)	Above Guideline	0/0	0/0
Below Guideline	146 / 148 (98.6 %)	2 / 148 (1.4 %)	Below Guideline	18 / 83 (21.7 %)	65 / 83 (78.3 %)

FOURTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	197 / 197 (100 %)	0 / 197 (0 %)	Within Guideline	0/0	0/0
Above Guideline	23 / 25 (92 %)	2 / 25 (8 %)	Above Guideline	0/0	0/0
Below Guideline	18 / 18 (100 %)	0 / 18 (0 %)	Below Guideline	0 / 11 (0 %)	11 / 11 (100 %)

EIGHTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	84 / 85 (98.8 %)	1 / 85 (1.2 %)	Within Guideline	0/0	0/0
Above Guideline	30 / 31 (96.8 %)	1 / 31 (3.2 %)	Above Guideline	0/0	0/0
Below Guideline	18 / 18 (100 %)	0 / 18 (0 %)	Below Guideline	2 / 28 (7.1 %)	26 / 28 (92.9 %)

COMPARISON OF CIRCUITS WITH AND WITHOUT A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINE SENTENCES

1. RATIO OF REVERSALS FOR WITHIN- AND OUTSIDE-GUIDELINE SENTENCES

	All Circuits	Non-Presumption Circuits Only[1]	Presumption Circuits Only[2]
Within Guideline Sentences	15 / 1049 reversed (1.4 %)	9 / 372 reversed (2.4 %)	6 / 677 reversed (0.9%)
Outside Guideline Sentences	76 / 485 reversed (15.7 %)	18 / 206 reversed (8.7 %)	58 / 279 reversed (20.8 %)

2. RATIO OF REVERSALS FOR GOVERNMENT APPEALS OF BELOW- GUIDELINE SENTENCES

	All Circuits	Non-Presumption Circuits Only	Presumption Circuits Only
Sentence Affirmed	18 / 83 (21.7 %)	10 / 25 (40 %)	8 / 58 (13.8 %)
Sentence Reversed	65 / 83 (78.3 %)	15 / 25 (60 %)	50 / 58 (86.2 %)

RESULTS BY CIRCUIT

DISTRICT OF COLUMBIA

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	2	0	Within Guideline	0	0
Above Guideline	0	0	Above Guideline	0	0
Below Guideline	0	0	Below Guideline	0	0

FIRST CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	23	0	Within Guideline	0	0
Above Guideline	2	1	Above Guideline	0	0
Below Guideline	5	0	Below Guideline	0	4

SECOND CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	38	1	Within Guideline	0	0
Above Guideline	14	0	Above Guideline	0	0
Below Guideline	13	0	Below Guideline	1	2

THIRD CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	60	2	Within Guideline	0	0
Above Guideline	15	0	Above Guideline	0	0
Below Guideline	20	0	Below Guideline	0	1

FOURTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	197	0	Within Guideline	0	0
Above Guideline	23	2	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	0	11

FIFTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	62	0	Within Guideline	0	0
Above Guideline	54	1	Above Guideline	0	0
Below Guideline	3	1	Below Guideline	0	5

SIXTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	87	1	Within Guideline	0	0
Above Guideline	14	3	Above Guideline	0	0
Below Guideline	12	0	Below Guideline	4	2

SEVENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	169	1	Within Guideline	0	0
Above Guideline	13	0	Above Guideline	0	0
Below Guideline	8	0	Below Guideline	2	5

EIGHTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	84	1	Within Guideline	0	0
Above Guideline	30	1	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	2	26

NINTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	72	6	Within Guideline	0	0
Above Guideline	24	1	Above Guideline	0	0
Below Guideline	20	1	Below Guideline	4	2

TENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	70	3	Within Guideline	0	0
Above Guideline	9	0	Above Guideline	0	0
Below Guideline	11	0	Below Guideline	0	1

ELEVENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	170	0	Within Guideline	0	0
Above Guideline	47	0	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	5	6

END NOTES

1. The First, Second, Third, Ninth, and Eleventh Circuits have not adopted a presumption of reasonableness for within-guideline sentences.

2. The District of Columbia and the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have adopted a presumption of reasonableness for within-guideline sentences.

No. 06-5618

In the Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE SENATORS EDWARD M. KENNEDY, ORRIN G. HATCH, AND DIANNE FEINSTEIN IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

Amici are United States Senators with extensive involvement and interest in federal sentencing. Senator Edward M. Kennedy is a Democrat from Massachusetts. He is a former Chairman of the Senate Judiciary Committee, has served on the Committee since 1963, and introduced the bill that became the Sentencing Reform Act of 1984 ("Sentencing Reform Act"). Senator Orrin G. Hatch is a Republican from Utah. He is a former Chairman of the Senate Judiciary Committee, has served on the Committee since 1977, and was an original co-sponsor of the bill that became the Sentencing Reform Act. Senator Dianne Feinstein is a Democrat from California. She is the first woman member of the Judiciary Committee and has served on the Committee since 1994. The Senate Judiciary Committee has legislative jurisdiction over the federal criminal justice system. Members of the Committee have been involved in monitoring the operation of the federal sentencing system and amending the federal sentencing law when appropriate.

The Sentencing Reform Act was the product of more than a decade of inter-branch, bicameral, and bipartisan deliberations – the most careful examination of sentencing policy ever conducted by Congress. In enacting this legislation, Congress sought to remedy the "shameful disparity in criminal sentences" that plagued the federal sentencing system and created "a disrespect for the law." S. Rep. No. 98-225, at 46, 65 (1983). Amici have a strong interest in advancing the fundamental goals of the Act, including the elimination of unwarranted disparities, the promotion of transparency in sentencing, and the preservation of judicial

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the amici and their counsel, made a monetary contribution for the preparation or submission of this brief. Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from respondent has been submitted concurrently with this filing.

discretion sufficient to allow the fair and thoughtful imposition of individual sentences.

SUMMARY OF ARGUMENT

This Court should continue the effort it began in *United States v. Booker*, 543 U.S. 220, 244 (2005), to harmonize its Sixth Amendment jurisprudence with the structure and goals of the Sentencing Reform Act.

Congress enacted and President Reagan signed this legislation to address a national disgrace: the wide disparity in sentences imposed in federal criminal cases. The unguided, unreviewable discretion given to federal judges had resulted in gross disparities throughout the nation. Judges handed out vastly differing sentences of offenders who had similar backgrounds and had been convicted of similar crimes. Some escaped prison altogether, while others were imprisoned for excessive periods. Illegitimate factors such as race, gender, and poverty distorted sentencing decisions. The impact on our criminal justice system was devastating. There was no certainty in punishment. Many offenders viewed sentencing as a game of chance in which they could play the odds on avoiding punishment. The system bred public cynicism and disrespect for the law, in flagrant violation of the principle that our government is a "government of Laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

In *Booker*, the Court effectively nullified the provision of the Sentencing Reform Act, 18 U.S.C. § 3553(b)(1), that had established the generally mandatory nature of the federal sentencing guidelines. Under this provision, district courts had been bound to impose sentences within the applicable guideline range, except when an aggravating or mitigating factor not adequately considered by the Sentencing Commission warranted a departure. By nullifying this provision, the Court effectively made the guidelines advisory. It chose this approach in order to achieve a functioning sentencing system

that both satisfies constitutional standards and, to the greatest extent possible, advances the intent of Congress to eliminate unwarranted disparity, achieve transparency in sentencing, and impose individualized sentences tailored to the offender and the crime.

Amici agree that that these goals should continue to guide the Court's sentencing jurisprudence. We recognize the possibility that the *Booker* remedy may, over time, result in more disparities, but that fear has not yet been realized. We also agree that the surviving provisions of the Act – if respected faithfully by the courts, the Sentencing Commission, and Congress -- can still provide the framework for a cohesive and effective sentencing system. In this brief, we point to key elements of the Act that will, in the post-*Booker* era, allow the development of rules that promote fair and uniform sentences.

The main sentencing directive left in place after *Booker* establishes uniform general criteria for courts to consider in formulating a sentence. These criteria refer the court to, among other things, the nature of the offense and the characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, provide just punishment, act as a deterrent, and provide appropriate rehabilitative and treatment options; the availability of alternative sanctions; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. Congress established these criteria to ensure that all federal courts would consider the same general factors and purposes of punishment.

Section 3553(a) also directs courts to consider the applicable range under the sentencing guidelines and any pertinent policy statement issued by the Commission. Amici urge the Court to direct district courts to calculate the applicable guideline range at the outset of the sentencing process. The guidelines will then provide a benchmark for consideration of the other factors in § 3553(a), which we

believe the courts should evaluate with an appropriate degree of deference to the views expressed by the Commission. Congress intended the Commission to establish sentencing policies based on objective data and sound public policy, not prejudice or politics, and courts should respect that institutional role.

Amici recognize that after *Booker*, there is no general mandate that courts impose sentences within the guidelines. Given this change, two elements of the statutory scheme are even more critical than before to achieving uniformity. First, 18 U.S.C. § 3553(c) requires a district court to state "the reasons for its imposition of a particular sentence," regardless of whether it is within the guidelines. Second, by excising 18 U.S.C. § 3742(e), a provision on standards of appellate review that relied "upon the Guidelines' mandatory nature," *Booker*, 543 U.S. at 245, the Court effectively expanded appellate review for "reasonableness" to all sentences. Amici urge the Court to apply these provisions with the purpose of establishing a national law on sentencing: a body of principled rules, developed through the reasoned judgment of judges across the nation subject to appellate review, that promote fairness, transparency, and consistency.

In the case below, the district court may have been justified in imposing a sentence below the applicable guideline range based on the circumstances of the offense, the defendant's background, and other factors – including the disproportionate emphasis assigned by the sentencing guidelines to the relevant quantity of crack cocaine. In our view, however, the court failed to state a sufficiently clear and principled basis for its sentence that can be readily applied by other courts in like circumstances and reviewed for reasonableness on appeal. The Eighth Circuit Court of Appeals was therefore correct to remand the case for resentencing, and we urge this Court to affirm that decision.

ARGUMENT

I. PRIOR TO THE SENTENCING REFORM ACT, FEDERAL SENTENCING WAS ARBITRARY, INCONSISTENT, AND UNFAIR.

For most of the nation's history, the sentencing discretion of federal judges was virtually "unfettered." *Dorszynski v. United States*, 418 U.S. 424, 437 (1974). Congress had prescribed for most federal offenses a broad range of punishment that could be imposed on a convicted defendant. A judge was free to impose a sentence anywhere within that range, based on virtually any information he deemed relevant, after conducting "an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972) (citations omitted). Sentences imposed by district judges, "if within statutory limits," were "generally not subject to review." *Id.* at 447 (citations omitted). *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 225-27 (1993).

Before the mid-20th century, the effect of such indeterminate sentencing had become clear. In 1938, Attorney General Cummings reported "that there frequently occur wide disparities and great inequities in sentences imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of fact," making it "difficult to maintain that equal, even-handed justice is attained." U.S. Dep't of Justice, *Annual Report of the Attorney General*, 6, 7 (1938). This view was reiterated in reports by Attorneys General Murphy, Jackson, and Biddle, and thereafter by Congress. *See id.*, at 6 (1939); *id.* at 5-7 (1940); *id.* at 4 (1941); *see also* H.R. Rep. No. 85-1946, at 6 (1958) (Congressional report on "existence of widespread disparities in the sentences imposed by Federal

courts . . . in different parts of the country, between adjoining districts, and even in the same districts").

In an influential 1972 treatise, Marvin Frankel, a district judge and former law professor, described the disparities as "terrifying and intolerable for a society that professes devotion to the rule of law." Marvin E. Frankel, *Criminal Sentences: Law Without Order* 5, 66 (1972). Judge Frankel considered such disparities a threat not only to the integrity of the legal system, but also to the dignity and welfare of defendants subject to "potentially arbitrary or malicious exercises of power." *See* Michael O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 760 (2006).

During the 1970s, a number of empirical studies documented significant disparities in federal sentencing. A 1972 study by the United States Attorney's Office for the Southern District of New York determined that "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia [Circuit]. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit." S. Rep. No. 98-225, at 41 n.143 (1983) (quoting Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, 167 (1973)). A 1974 study by the Second Circuit underscored the problem. Fifty district judges were given identical files from 20 actual criminal cases and asked to impose a sentence. "The variations in the judges' proposed sentences in each case were astounding." Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 358 (1979) (citing Anthony Partridge & William B. Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges of the Second Circuit* 6-7 (1974)). *See generally* Norval Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267,

272-74 (1977) (stating that "the data on unjust sentencing disparity have indeed become quite overwhelming").

Even more disturbing, studies indicated that at least some sentencing disparities resulted from consideration of race, gender, and other illegitimate factors. *See Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong. pt. 13, at 9047 (1977) ("The statistics are appalling. . . . [W]hen both the crime and the previous history of the offender are held equal, black and minority offenders fare considerably worse.") (testimony of Prof. Alan M. Dershowitz); H.R. Rep. No. 98-1017, at 102 (1983) (noting the "potential for sentencing decisions to be based on inappropriate grounds such as race or sex"). *See also* Edward M. Kennedy, *Introduction to Symposium on Sentencing, Part I*, 7 Hofstra L. Rev. 1, 2 (1978) ("The present process results in particularly disparate treatment of the young and the poor and nurtures a growing public cynicism about our institutions.").

By the mid-1970s, a consensus had developed among judges, lawyers, and criminal justice experts about the need to address the "shameful disparity in criminal sentences" that plagued the existing system. S. Rep. No. 98-225, at 65 (1983). During nearly ten years of hearings, Congress heard from scores of witnesses with a broad range of philosophies and expertise. They described a system in which similarly situated defendants received vastly different sentences because they appeared before different federal judges. Judges were not required to explain their sentences, and appellate courts had no authority to remedy the disparate sentencing practices of district judges in their circuits. Because of the inconsistent and unpredictable application of parole, a defendant might receive a lengthy prison sentence but serve only a portion of it. *See* Stith & Koh, *supra*, at 227-28 (describing criticism of indeterminacy and arbitrari-

ness of federal parole system). As a result, Senator Kennedy concluded, the federal criminal justice system was "in desperate need of reform. . . . It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served." S. Rep. No. 98-223, at 34 (1983) (quoting 129 Cong. Rec. S2090 (daily ed. Mar. 3, 1983)).

II. CONGRESS HAS SOUGHT TO PROMOTE CONSISTENCY WHILE MAINTAINING THE DISCRETION OF JUDGES TO IMPOSE FAIR AND PROPORTIONAL SENTENCES.

A. The Sentencing Reform Act Was Based on Extensive Bipartisan Deliberation.

The Sentencing Reform Act was the result of more than a decade of reports, hearings, and deliberations on federal sentencing involving all branches of government, academic researchers, practitioners, and other interested parties. It represents Congress' most comprehensive effort to reform the federal sentencing system.

Senator Kennedy first introduced a bill proposing the creation of sentencing guidelines in 1975. *See* S. 2699, 94th Cong. (1st Sess. 1975). The proposal was refined by Senators Kennedy and McClellan and, in the following Congress, it was included in a more comprehensive bill to revise the federal criminal code. *See* S. 1437, 95th Cong. (1st Sess. 1977). As introduced and passed by the Senate Judiciary Committee on November 15, 1977, S. 1437 contained most of the critical provisions of the statutory scheme that would be enacted seven years later. It abolished parole, thus ensuring that offenders' would generally serve the full sentence imposed. It created a sentencing commission, directed it to promulgate sentencing guidelines, and estab-

lished a right of appellate review for sentences above or below applicable guideline ranges.

The bill passed by the Committee also gave federal judges substantial discretion to depart from the guidelines. It directed judges to consider a wide range of factors, including the guideline range, the general purposes of sentencing, and "the nature and circumstances of the offense and the history and characteristics of the defendant." *See* S. 1437, § 101, 95th Cong. (1st Sess. 1977) (proposed tit. 18, § 2003(a), as reported by Senate Judiciary Committee on Nov. 15, 1977). In the event judges decided to depart from the guideline range, the bill required them to state a "specific reason." *Id.* at § 101 (proposed tit. 18, § 2003(c)). Under this directive, judges were required to "pay deference to the guidelines," but deference was "not a duty; the court would not be bound by the guidelines." *See* Kennedy, *Toward a New System*, *supra*, at 374. The requirement of a judicial statement and the availability of appellate review served as checks "against unreasonable punishment." *Id.* at 370. As modified and enacted, these provisions became 18 U.S.C. § 3553(a) and (c).

After S. 1437 was reported to the Senate, the Senate adopted an amendment sponsored by Senator Hart that directed judges "to impose a sentence within the range specified in the Commission's guidelines unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence." *See* 124 Cong. Rec. 382-83 (1978) (Unprinted Amendment No. 1100 adopted Jan. 23, 1978). Senator Kennedy recommended the amendment's adoption in order to "make clearer the basic presumptive aspects of the guidelines." 124 Cong. Rec. 383 (1978). As modified and enacted, this provision became 18 U.S.C. § 3553(b).

S.1437 was passed by the Senate on January 30, 1978. It was carried forward and further refined in the next two Congresses, *see* S. 1722, 96th Cong. § 125 (1st Sess. 1979); S. 1630, 97th Cong. § 125 (1st Sess. 1981), and was reported to the Senate with the support of nearly all members of the Judiciary Committee. In 1982, the proposals were endorsed by the Attorney General's Task Force on Violent Crime and were included in S. 2572, 97th Cong. (2d Sess. 1982), which passed the Senate on September 30, 1982, by a vote of 95 to 1. Similar legislation was approved by the House Judiciary Committee during this period. *See* H.R. 6915 and H.R. Rep. No. 96-1396 (2d Sess. 1980).

On March 3, 1983, Senators Kennedy, Thurmond, Biden, Hatch, Leahy, Specter, and others introduced S. 668, the "Sentencing Reform Act of 1983." Five days of hearings were held on the legislation before the Subcommittee on Criminal Law of the Senate Judiciary Committee. The Committee reported two bills containing identical guidelines provisions to the Senate. *See* S.688, *reported by* S. Rep. No. 98-223 (1983); S. 1762, tit. II (sentencing reform), *reported by* S. Rep. No. 98-225 (1983). After extended debate, the Senate passed both bills by overwhelming majorities: 91 to 1, 130 Cong. Rec. S759 (daily ed. Feb. 2, 1984); and 85 to 3, *id.* at S818-819. After the House of Representatives passed similar sentencing provisions, 130 Cong. Rec. H10130-31 (daily ed. Sept. 25, 1984), the Sentencing Reform Act was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.). President Reagan signed the bill into law on October 12, 1984.

B. The Sentencing Guidelines Were Intended to Channel, Not Eliminate, the Discretion of Judges.

In enacting the Sentencing Reform Act, Congress did not seek to eliminate judicial discretion. Instead, it sought to achieve increased transparency, consistency, and proportion-

ality in sentencing while preserving the discretion of courts to impose appropriate sentences based on the specific characteristics of offenders and crimes.

To increase uniformity and proportionality in sentencing, Congress established the Sentencing Commission and directed it to promulgate sentencing guidelines. The Commission began its work in 1985 and transmitted its initial guidelines to Congress in April 1987, and they became effective six months later.

From the time the Sentencing Reform Act was enacted, tension between the directives to judges set forth in § 3553(a) and (b) generated "confusion and heated debate" about the mandatory or advisory nature of the guidelines. Stith & Koh, *supra*, at 246. As discussed above, § 3553(a) represents the original directive set forth in the bill passed by the Senate Judiciary Committee on November 15, 1977. S. 1437, 95th Cong. (1st Sess. 1977). Under what has come to be known as the "parsimony" clause, § 3553(a) requires judges to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in § 3553(a)(2). Section 3553(a) also lists seven factors for judges to consider in imposing a sentence: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the purposes of sentencing; (3) the range of available sentencing alternatives; (4) the applicable Guidelines sentence; (5) any pertinent policy statements issued by the Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. By contrast, § 3553(b), added to the bill on the Senate floor, directed judges to follow the guidelines unless they found "that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the guidelines]."

Following enactment, some authorities argued that the more open-ended directive in § 3553(a) should take precedence over § 3553(b). *See, e.g., United States v. Denardi*, 892 F.2d 269, 275-77 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part); Marc Miller & Daniel J. Freed, *Editors' Observations: Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 Fed. Sent'g Rep. 235-38 (1991). The Sentencing Commission, on the other hand, maintained that § 3553(b) trumped § 3553(a) and required judges to impose sentences within the applicable guideline range except in the unusual case where the Commission had not already considered a potential basis for departure in the guidelines. Thus, it asserted, "in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure." *See U.S. Sentencing Guidelines Manual* ch. 1, pt. A, § 4(b) (1987).[2]

The courts ultimately agreed that the directive in subsection (b), not (a), controlled the sentencing determination. As this Court summarized in *Mistretta v. United States*, 488 U.S. 361 (1989), the Act made the guidelines "binding on the courts," while preserving "for the judge the discretion to

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[2] In 1987 the tension between § 3553(a) and (b) surfaced in a congressional dispute involving a seemingly technical amendment to the Act: a provision adding the phrase "of a kind, or to a degree" as a qualifier to the term "an aggravating or mitigating circumstance" in § 3553(b). Sentencing Reform Act of 1987, § 3, Pub. L. No. 100-182, 101 Stat. 1266. A statement prepared in the House of Representatives observed that the Commission's purported consideration of a factor did not preclude its use as a ground for departure from the applicable guideline range – and, moreover, that § 3553(a) provided an independent avenue for departure. *See* 133 Cong. Rec. 31,947-49 (1987). In response, four leading Senate sponsors of the Act submitted a joint statement asserting that the amendment did not change the standard for departure, which was governed "exclusively" by § 3553(b). 133 Cong. Rec. S16,646 (daily ed. Nov. 20, 1987) (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch).

depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines." *Id.* at 367.

In this context, it is important to distinguish the sentencing guidelines from mandatory minimum sentences, which require a "one size fits all" sentence for defendants convicted of a certain crime, regardless of the specific nature of the offense or the defendant's background. Judges, experts, and practitioners in the federal criminal justice system have long opposed mandatory minimums on the ground that they undermine the goals of the Sentencing Reform Act by fostering unwarranted disparity, subjecting defendants with differing levels of culpability to the same punishment, and adding another unnecessary layer of complexity to the sentencing process. *See, e.g., ABA Justice Kennedy Commission Report with Recommendation to the ABA House of Delegates*, Res. 121A at 27-29 (A.B.A. 2004); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 192-96 (1993).[3]

By contrast, it is instructive to consider the extent to which Congress believed that even its "mandatory" directive, codified in 18 U.S.C. § 3553(b), preserved the discretion of judges to impose punishment that fit both individual offenders and crimes. *See Williams v. New York*, 337 U.S. 241,

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[3] Some advocates of mandatory sentencing laws believe that coerced uniformity is appropriate. These laws do not produce uniformity, however; they merely transfer discretion from judges to prosecutors, who decide whether defendants will be charged with an offense carrying a mandatory penalty and whether to insist on a plea to that count of the indictment. A guideline system, whether mandatory or advisory, makes judges accountable for the discretion they exercise; mandatory minimums impose no similar check on prosecutors.

247 (1949). In the Senate Report, the sponsors of the Act stated that they did not intend for the guidelines to be "imposed in mechanistic fashion." S. Rep. No. 98-225, at 52 (1983). To the contrary, they believed that judges were obligated "to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *Id.*

> The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law.

Id. at 52-53. Citing the experience of the U.S. Parole Commission, which used guidelines to determine presumptive release dates for federal prisoners, the sponsors expressed their expectation that departure from the sentencing guidelines would be proper in as many as 20% of cases. *Id.* at 52 n.193.

III. THE COURT SHOULD CONTINUE TO ADVANCE THE GOALS OF THE SENTENCING REFORM ACT.

A. The Remedial Opinion in *Booker* Properly Sought to Retain a System Consistent with Congress' Intent "as Embodied in the 1984 Sentencing Act."

Like all Acts of Congress, the Sentencing Reform Act is entitled to a strong presumption of constitutionality. The extensive inter-branch deliberations and strong bipartisan consensus that led to its passage weigh heavily against any judicial modification of the statutory scheme that is inconsistent with Congress' goals.

Clearly, Congress did not anticipate how the Court would ultimately apply the right to jury trial in the context of non-capital sentencing. As this Court noted in *Mistretta*, the sentencing guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." 488 U.S. at 396. In enacting the law, Congress did not intend that juries would assume the responsibility for making the complex factual determinations traditionally left to sentencing judges.

In *United States v. Booker*, 543 U.S. 220, 244 (2005), this Court held that the Sixth Amendment is violated by the imposition of an enhanced sentence under the guidelines based on a judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. The Court based its holding on its prior decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Collectively, these cases have been described as "a new Sixth Amendment jurisprudence with profound implications for sentencing procedures." Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L.J. 387, 401 (2006). *See also Booker*, 543 U.S. at 247-48 (describing the holding as "legislatively unforeseen" and "a constitutional requirement that creates fundamental change"); *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting) ("a watershed change in constitutional law").

Amici do not challenge the validity of the Court's holding. The Court has clearly sought to give full respect to the Sixth Amendment right to jury trial – a critical protection against injustice throughout our history and a fundamental part of our democracy. Instead, amici urge the Court to apply this constitutional right in a manner consistent with the basic structure and goals of the Sentencing Reform Act. In this respect, amici commend the Court for its effort in

Booker to devise a remedy that conforms most closely to Congress' intent. *See* 543 U.S. at 246.

The merits majority in *Booker* made clear that the Sixth Amendment problem arose from the "mandatory" nature of the sentencing guidelines. It explained that if the guidelines "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Booker*, 543 U.S. at 233. While noting the tension between § 3553(a) (which "lists the Sentencing Guidelines as one factor to be considered in imposing a sentence") and § 3553(b), the Court reiterated its view that the latter directive took precedence and made the guidelines "not advisory; [but] mandatory and binding on all judges." *Id.* at 233-34 & n.2 (citing *Mistretta*, 488 U.S. at 367). As such, their application violated the Sixth Amendment.

Rather than strike down the Act in its entirety or impose a "jury trial" requirement not anticipated by Congress, the remedial majority sought to make changes that deviated least "from Congress' intended system." *Id.* at 247. Specifically, it decided to retain all provisions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) "consistent with Congress' basic objectives in enacting the statute." *Id.* at 258-59. It excised two provisions it found inconsistent with the Sixth Amendment holding: § 3553(b)(1) (as amended), the provision directing judges to sentence defendants within the applicable guideline range absent a special justification for departure; and 18 U.S.C. § 3742(e), a provision enacted in 2003 that established new appellate review standards for departures and which, in the Court's view, depended "upon the Guidelines' mandatory nature." *Id.* at 245.

The result of the majority's holding is a system of advisory guidelines much like that initially approved by the

Senate Judiciary Committee in 1977. *See id.* (stating that excisions make "the Guidelines effectively advisory"). While not strictly bound by the guidelines, judges must still consult them and take them into account, along with the other factors enumerated in § 3553(a). *Id.* at 245-46, 259, 264. With the Court's excision of § 3742(e), the same factors guide appellate courts in reviewing sentences for "reasonableness." *See id.* at 261-64.

This system, the Court conceded, was not the system of mandatory guidelines enacted by Congress. *Id.* at 265. The Court predicted, however, that the continued operation of the Sentencing Commission, consideration of the guidelines by district judges, and appellate review would "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-65; *see also id.* at 246 (stating that this approach makes "the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve").

B. Key Elements of the Extant Statutory Scheme Promote Transparency, Consistency, and Fairness in Sentencing.

At the conclusion of its opinion in *Booker*, the majority noted that the "ball now lies in Congress' court," suggesting that Congress may wish to devise a new system that advances its policy objectives in a manner compatible with the Court's Sixth Amendment doctrine. 543 U.S. at 265.

Amici, along with our colleagues in the House and Senate, the Sentencing Commission, judges, lawyers, and criminal justice experts, have closely monitored the operation of the federal sentencing system over the past two years.

Thus far, based on the limited data available, we do not believe that wholesale revision of the system is warranted. There has not been a rash of unwarranted sentencing disparities. Judges have not refused to consider the guidelines. Confidence in the integrity and fairness of the courts has not diminished.

In fact, according to a recent report by the Sentencing Commission, since *Booker* the overwhelming majority (85.9%) of sentences imposed by federal judges have been in conformity with the sentencing guidelines. United States Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* 46 (Mar. 2006). In two-thirds of the cases involving a sentence below the guideline range, the sentence imposed has been within 40% of the bottom of the range. *Id.* at 47. And while the rate of below-range sentences has increased after *Booker*, so has the average length of sentences imposed. *Id.* at 69. These data do not reflect a sentencing system in crisis. To the contrary, "the most notable fact about the federal system is how little things have changed." *Oversight Hearing on* United States v. Booker*: One Year Later – Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of Hon. Paul G. Cassell, Judicial Conference of the United States); *see also id.* at 9 ("[E]ven taking the critics' own narrow view of the appropriate measure of change, *more than 90% of all cases are being resolved in the same way as they were before* Booker.") (emphasis in original).

Amici acknowledge that after *Booker*, mandatory guidelines are "no longer an open choice." 543 U.S. at 263. Nevertheless, we believe that the existing system provides an adequate structure for the advancement of the basic goals of the Sentencing Reform Act, including transparency, the elimination of unwarranted disparity, and fair and propor-

tional sentences. The long-term viability of this system will depend on the continued willingness of judges, the Commission, and Congress to advance these goals.

There are several steps the Court can take to do so now.

1. Consulting the Guidelines

First, the Court should reiterate the duty of district judges to consult the sentencing guidelines, calculating and considering the same guideline ranges they would have applied before *Booker*. *See* 543 U.S. at 264. This requirement is set forth under § 3553, subsection (4) of which requires judges to consider "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." The sentencing guidelines thus remain central to the operation of the federal sentencing system, and they are entitled to weight and deference. Judges should consult the guidelines in good faith, *see United States v. Tucker*, 386 F.3d 273, 278 (D.C. Cir. 2004), with an appreciation for the factors considered by the Commission in their promulgation and respect for the goals Congress intended them to promote.

Amici believe that it is appropriate for judges to calculate the applicable guideline range at or near the start of the sentencing process, as the guidelines "are the only sentencing factor that yield a measure of time." *United States v. Jimenez-Beltre*, 440 F.3d 514, 525 (1st Cir. 2006) (Lipez, J., dissenting), *cert. denied*, 2007 WL 36306 (U.S. Jan. 8, 2007) (No. 06-5727). The guidelines will then serve as an appropriate benchmark for consideration of the other factors in § 3553(a). *See* Brief of Law Professors Who Study Sentencing Reform as Amici Curiae in Support of None of the Parties at 12, *Claiborne v. United States*, No. 06-5618 (Dec. 18, 2006) ("Generally requiring basic Guideline calculations at the start of the sentencing process fosters a beneficial measure of procedural and substantive consistency: Guide-

line provisions can help frame, inform, and regularize the exercise of reasoned judgment by different sentencing judges across the nation.").

2. Deference to Commission Expertise

While the guidelines provide a useful start, amici acknowledge that district judges can no longer stop there. Section 3553(a) also directs courts to consider the needs to avoid unwarranted sentencing disparities, to provide restitution to victims, and for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 260 (citing 18 U.S.C. § 3553(a)(2)). Judges must integrate the factors taken into account by the guidelines with these broader concerns about the purposes and effects of punishment.

Clearly, *Booker* has made sentencing more complex. Congress never intended the guidelines to be applied in a mechanistic manner, but some judges nonetheless criticized the system as an unduly rigid and administrative "fill in the blanks" exercise. That charge no longer carries any weight. Now, judges must now "exercise reasoned sentencing judgment by filtering the Guidelines' advice through the dynamic, multi-faceted, purpose-oriented provisions of § 3553(a)." Brief of Law Professors, *supra*, at 6.

Congress created the Commission to encourage reality-based sentencing policies: *i.e.*, policies based on objective data – not, for example, political debates "centering around the harsher versus more lenient punishment." Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 Judicature 208, 213 (1976). The Commission promulgated the original guidelines based on a comprehensive review of objective sentencing data, and it continues to revise the guidelines "in consideration of comments and data coming to

its attention." *See* 28 U.S.C. § 994(o); *Booker*, 543 U.S. at 263. Indeed, Congress intended that the work of the Commission, as well as the responses of judges, lawyers, and Congress, would enable the sentencing system to evolve over time, so that its rules and policies would reflect, "to the extent practicable, advancement in human knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C). *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988).

Deference is not equivalent to duty, of course, and after *Booker* judges are no longer foreclosed from weighing circumstances previously taken into consideration by the Commission. *See* 18 U.S.C. § 3553(b). Amici also acknowledge that the performance of the Commission has not always matched reformers' expectations. *See* Brief of Amicus Curiae Marc Miller *et al.* in Support of Petitioner at 16-25, *Rita v. United States*, No. 06-5754 (Dec. 18, 2006) (criticizing the Commission for failing to cite empirical evidence or provide reasoned expectations for certain guideline amendments). Indeed, the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and crack cocaine – a ratio currently incorporated in the sentencing guidelines – demonstrate that the guidelines do not always reflect objective data or good policy. *See* Section III.C, *infra*.

Nevertheless, amici believe that the Commission's guidelines and policy statements should continue to have a central role in sentencing. These factors are expressly enumerated in § 3553(a), and even after *Booker*, the Commission occupies an indispensable position in the sentencing structure devised by Congress. Congress established the Commission to remove politics, prejudice, and subjectivity from sentencing, and to provide a resource that would strengthen the ability of courts to impose fair and consistent sentences. To

the extent a court decides in a particular case that other § 3553(a) factors warrant the rejection of the guidelines or a policy statement issued by the Commission, it should state a principled reason for its decision.

3. Statement of Reasons

The general requirement that judges state the reasons for the sentences they impose, *see* 18 U.S.C. § 3553(c), applies regardless of whether a sentence falls within the applicable guideline range. The Seventh Circuit, for example, recently remanded a case for resentencing where the district judge, in imposing a sentence within the guidelines, did not adequately explain the basis for disregarding other § 3553(a) factors. *See United States v. Cunningham,* 429 F.3d 673, 679-80 (7th Cir. 2005).

The statement-of-reasons requirement advances several congressional goals. It promotes transparency and confidence in the sentencing system by making the justifications for each sentence part of the public record.[4] It facilitates the work of the Commission to refine the guidelines based on its monitoring of stated reasons for the imposition of sentences outside the applicable ranges. The requirement advances the goal of consistency by exposing unreasonable sentences to the light of day, and it generates a useful record for appellate review. *See* S. Rep. No. 98-225, at 80; Kennedy, *Toward a New System*, *supra*, at 370; *see also* Steven L. Chanenson, *Write On!*, 115 Yale L.J. Pocket Part 146, 147 (2006) (urging judges to write sentencing opinions "to communicate vital sentencing knowledge not only to the appellate courts but to Congress, the Commission, and the public as well").

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[4] Transparency can be achieved without undermining the independence of the judiciary. Amici strongly oppose any effort to compile reports on the sentencing practices of individual judges that fail to reflect all the factors informing their decisions in specific cases.

With these goals in mind, amici urge the Court to emphasize the need for principled sentencing justifications that other courts can consult and apply in like circumstances and which courts of appeal can readily review for reasonableness. Notwithstanding Holmes' observation that the common law "decides the case first and determines the principle afterwards," Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 Am. L. Rev. 1 (1870), elements of the statutory scheme indicate that courts should take a broader view when imposing sentences in the post-*Booker* era. First, § 3553(c) specifically directs judges to state "the reasons for its imposition of the particular sentence" (and "the specific reason" in writing for a sentence outside the applicable guideline range) – a statutory requirement that does not exist in most other areas of federal law. Second, the open-ended factors of § 3553(a) require elucidation by the courts at both the district and appellate level. Third, § 3553(a)(6) directs district courts to consider *in the course of imposing sentence* the need to avoid "unwarranted sentence disparities" – thus enlisting the courts directly in Congress's campaign to promote uniformity. It follows that district courts should articulate reasons for a sentence that not only are appropriate to the particular facts before them, but that also cite or establish principles of general applicability that can be followed or distinguished by other district courts in other cases.[5] The reasonableness of these principles may then be evaluated on appeal.

[5] In this respect, amici respectfully disagree with the proposition that sentencing decisions "must be done case by case and must be grounded in case-specific considerations," without reliance on broader principles that can be applied by courts in other cases. *See, e.g., United States v. Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006). Uniformity is advanced by the development of rules of general applicability, not the exercise of unguided discretion on a case-by-case basis.

4. Appellate Review

Appellate review may be the most powerful mechanism for ensuring the fairness and consistency of sentences imposed under the new advisory system. As discussed above, criminal justice experts believed that its absence was a primary cause of the sentencing disparity that existed before the Sentencing Reform Act. "The contention that sentencing is not regulated by rules of 'law' subject to appellate review is an argument for, not against, a system of appeals," Judge Frankel wrote. "The 'common law' is, after all, a body of rules evolved through the process of reasoned decision of concrete cases, mainly by appellate courts." Frankel, *supra*, at 84.

In developing the Act's provisions on appellate review, codified at 18 U.S.C. § 3742, Congress sought "to afford enough guidance and control" over the traditional sentencing discretion of district judges "to promote fairness and rationality, and to reduce unwarranted disparity." S. Rep. No. 98-225, at 150 (1983). Congress limited appellate review to sentences that were imposed either outside the applicable guideline range or as the result of an incorrect application of the guidelines. By eliminating the mandatory nature of the guidelines, the Court in *Booker* effectively expanded appellate review to all sentences, stating that the factors in § 3553(a) will guide courts "in determining whether a sentence is unreasonable." 543 U.S. at 261.

The complexity inherent in § 3553(a) will necessarily affect appellate review as well. While showing appropriate deference to the fact-based sentencing decisions of district judges, *see Koon v. United States*, 518 U.S. 81, 98 (1996), amici anticipate that over time appellate courts will develop rules that address, among other issues, how the § 3553(a) factors should be applied; what weight the parsimony clause in § 3553(a) should receive in the sentencing process; the relationship between individual sentences and the purposes

of punishment set forth in § 3553(a)(2); and the elimination of "unwarranted sentence disparities" among similarly situated defendants, particularly disparities reflecting consideration of illegitimate factors such as race and gender. These developments will be consistent with the goals of the Sentencing Reform Act, whose sponsors believed that "in the long run" appellate review would "facilitate the development of a truly national law of sentencing." *See* Kennedy, *Toward a New System*, *supra*, at 374.

In this case and its companion, the Court will decide the extent to which such appellate devices as the "extraordinary circumstances" test applied by the Eighth Circuit Court of Appeals below may be used to discourage the imposition of below-guideline sentences without replicating the same Sixth Amendment violation addressed in *Booker*. However the Court decides this constitutional issue, amici urge it to affirm the right and obligation of courts at all levels to articulate principled rules that are consistent with the text of § 3553(a) and designed to realize a fairer and more effective sentencing system.

C. The District Court Failed to State Clear and Principled Reasons for the Sentence It Imposed.

Amici believe that the decision of the Eighth Circuit Court of Appeals to remand this case for resentencing should be affirmed because, notwithstanding the district court's consultation of the guidelines and other relevant factors, it failed to state with sufficient clarity principled reasons for the sentence it imposed, as required by § 3553(a) and (c).

Because Mr. Claiborne pleaded guilty to possessing more than five grams of crack cocaine, he was subject to a minimum five-year sentence under 21 U.S.C. § 844(a). At sentencing, however, the court concluded that he qualified for the "safety valve" exception, which allows a sentence less than the otherwise mandatory minimum if the defendant is a first-time, low-level nonviolent offender who had

provided truthful information about his offense to the government. *See* 18 U.S.C. § 3553(f); *U.S. Sentencing Guidelines Manual* § 5C1.2 (2006). Congress enacted the "safety valve" provision in 1994 to provide relief for the harsh and disproportionate sentences imposed on nonviolent drug offenders by mandatory minimums, and thereby build on "other reforms enacted over the last decade that have dramatically increased the consistency, rationality, and, therefore, effectiveness of federal sentencing laws." H.R. Rep. No. 103-460 (1994).

After the district court determined that no mandatory minimum applied, § 3553(a) became the controlling statutory directive. *See United States v. Cardenas-Juarez*, 469 F.3d 1331, 1334 (9th Cir. 2006) (holding that when safety-valve requirements are met, courts must consult sentencing guidelines "even though they now have the discretion to impose non-Guidelines sentences") (citation omitted). The court properly calculated and considered the applicable guideline range of 37 to 46 months imprisonment, Sent. Tr. at 14, but decided to impose a substantially lower sentence of 15 months. As the judge explained, "[W]hen I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away." Sent. Tr. at 25.

While amici respect the thoughtfulness with which the court conducted the sentencing of Mr. Claiborne, we do not believe that its methodology fully conformed to the structure and goals of the Sentencing Reform Act. Some of the factors cited by the court – including the quantity of drugs and the defendant's criminal history – were already considered by the Commission in promulgating the guidelines, and the court did not discuss whether the applicable guideline range inadequately accounted for their significance. It is

also unclear whether the court's remark that a guideline sentence would result in "throwing [the defendant] away" related to the parsimony clause or the purposes of punishment set forth in § 3553(a)(2), and if so, how. The court referred to Mr. Claiborne's age, employment, family support, and low likelihood of recidivism, but did not discuss how such factors should be generally evaluated and applied under § 3553(a). One cited factor – the applicability of the safety valve – seems misplaced as a consideration, since it was essential for the § 3553(a) analysis to occur in the first place.

The court also noted that it did not consider a sentence of 37 months to be "commensurate" with other defendants it had seen "who had committed similar crimes but perhaps involving a larger . . . amount of drugs." Sent. Tr. at 25. This was an appropriate factor to consider, since § 3553(a)(6) directs courts to consider the avoidance of "unwarranted sentence disparities" in the course of imposing sentence. The court failed, however, to articulate a principled basis for its sentence that can be readily applied by other courts in like circumstances. The court may indeed have been correct that a sentence of 15 months, not 37 or 46 months, was warranted in light of the specific facts of the offense and the defendant's background. There is no guarantee, however, that another court applying the same factors considered by the court below would reach the same or a similar result. To avoid the kind of unwarranted disparities that Congress intended the Sentencing Reform Act to eliminate, clearer explanations for a sentence must be stated.

Amici do not foreclose the possibility that courts might cite the disproportionate emphasis assigned by the guidelines to the relevant quantity of crack cocaine as a principled reason for imposing a sentence below the applicable range. Even though defense counsel cited the crack-powder cocaine disparity at the hearing, Sent. Tr. at 16-17, the district court

did not cite it as a factor in imposing sentence. Attention to this problem, however, is long overdue.

The sentencing guidelines reflect a 100:1 ratio in the weight of powder and crack cocaine necessary to trigger an equivalent penalty. This disparity results from an early attempt by the Commission to incorporate congressionally mandated minimum penalties into the guidelines, even though the rigidity and harshness of mandatory minimums are completely inconsistent with the structure and goals of the Sentencing Reform Act. The Commission has since recognized that the 100:1 ratio exaggerates the relative harmfulness of crack cocaine and creates unwarranted disparities that are correlated with race. It has repeatedly urged Congress to eliminate the 100:1 ratio. *See* United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 132 (2004); United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 91 (2002); United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (1997).[6]

Congress has thus far failed to act on the Commission's recommendations.[7] That failure, however, should not be

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[6] The Sentencing Commission continues to hold hearings on the crack-powder issue. Judge Walton, appearing on behalf of the Criminal Law Committee of the Judicial Conference of the United States, recently testified that "it is unconscionable to maintain the current sentencing structure." United States Sentencing Comm'n, *Public Hearing on Cocaine Sentencing Policy* (Nov. 14, 2006) (testimony of Hon. Reggie B. Walton). *See also* The Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post*-Booker *World*, 18 Fed. Sent'g Rep. 310, 312 (2006) (stating unanimous view of bipartisan blue-ribbon committee that "100:1 weight ratio upon which guideline and mandatory minimum sentences for powder and crack cocaine are based is unjustifiable as a matter of policy").

[7] There is growing bipartisan support in Congress for addressing this disparity. For example, in the last Congress, Senators Sessions, Pryor,

interpreted as a license by the courts to disregard the Commission's policy statements. *See United States v. Williams*, ___ F.3d ___, No. 05-13205, 2006 WL 3615300, at *13 (11th Cir. Dec. 13, 2006) (Barkett, J., dissenting from the denial of rehearing en banc) ("Congress did not create an exception to § 3553(a) for crack offenses, nor did the Supreme Court in *Booker*. Sentencing courts must arrive at a sentence that is 'reasonable,' whether sentencing a crack offense or any other offense."). Since *Booker*, a number of courts have cited the Commission's policy statements and the parsimony clause of § 3553(a) as grounds for imposing below-guideline sentences for defendants convicted of crack cocaine offenses. *See* Ryan S. King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After* Booker 13-15, 17-19 (Sentencing Project, Jan. 2006). It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, *see* ABA Justice Kennedy Commission Report, *supra*, Res. 121A at 28-29, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.

Cornyn, and Salazar introduced a bill to reduce the ratio to 20:1. Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. (2d Sess. 2006). Other members of the House and Senate have expressed their support for a 2:1 ratio or elimination of the disparity altogether. Congress has yet to reach agreement on the role that drug weight should have or whether the applicable mandatory sentences should be repealed altogether.

CONCLUSION

Consistent with the structure and goals of the Sentencing Reform Act, the Court should encourage the development of rules that promote fair, proportional, and uniform sentences. The decision of the Eighth Circuit Court of Appeals to remand for resentencing should be affirmed.

Respectfully submitted,

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Dated: January 2007

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Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES,

Respondent.

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth and Fourth Circuits

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BRIEF OF LAW PROFESSORS WHO STUDY SENTENCING REFORM AS *AMICI CURIAE* IN SUPPORT OF NONE OF THE PARTIES

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INTEREST OF *AMICI CURIAE*[*]

Amicus curiae are a group of law professors who teach, study and write about sentencing reform and have closely followed the operation of the Federal Sentencing Guidelines in lower courts both before and after this Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Among the group are law professors who are co-authors of the leading casebook in the field of sentencing, *Sentencing Law & Policy* (Aspen 2004), and who are editors of and contributors to the leading law journal in the field of sentencing, the *Federal Sentencing Reporter*. Collectively, the professors in this group have written more than 100 articles and commentaries about federal sentencing reform.

The group is comprised of: Professor Douglas A. Berman, the William B. Saxbe Designated Professor of Law at the Moritz College of Law at The Ohio State University; Professor Margareth Etienne, Assistant Professor of Law, University of Illinois College of Law; Professor Marc Miller, Ralph W. Bilby Professor of Law, Rogers College of Law at the University of Arizona; Professor Michael M. O'Hear, Associate Professor of Law at Marquette University Law School; Professor Mark Osler, Professor of Law, Baylor Law School; Dean David N. Yellen, Dean and Professor of Law at Loyola University Chicago School of Law.

Amici offer this brief to highlight sentencing reform principles they believe can help inform the Court's resolution of these cases.

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[*] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A set of long-standing federal sentencing principles should inform the Court's resolution of these cases. These are principles that find expression in the writings of Judge Marvin Frankel and Professor Norval Morris, two leading advocates of reform proposals that resulted in the Sentencing Reform Act of 1984. These are principles that animate provisions of the Sentencing Reform Act of 1984 and the PROTECT Act of 2003, especially the detailed sentencing instructions Congress has set forth in 18 U.S.C. § 3553. These are principles that have been emphasized by this Court in rulings from *Mistretta v. United States*, 488 U.S. 361 (1989), to *Koon v. United States*, 518 U.S. 81 (1996), to *United States v. Booker*, 543 U.S. 220 (2005).

These principles recognize the critical importance of judicial sentencing discretion and suggest the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.

ARGUMENT

> "It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion."
>
> — MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 124 (1972)

> "The judge is an inevitably appropriate sentencing figure in the drama of crime and punishment ... [and] it should increasingly be required that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review. Principled sentencing lies at the heart of an effective criminal justice system. It is obvious that sentencing involves a heavy

> responsibility and raises issues of difficulty; it thus requires reasons given, critical public consideration of those reasons, critical appellate review of those reasons."
>
> **— Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 275-76 (1977)**

I. PRINCIPLES FOR FEDERAL SENTENCING

In *Mistretta v. United States*, this Court emphasized the "uniquely judicial subject of sentencing," and explained why all sentencing decision-making "lies so close to the heart of the judicial function." 488 U.S. at 408. In *Koon v. United States*, this Court stressed that it "has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 518 U.S. at 113. A related point drew consensus in *United States v. Booker*: "everyone agrees that the constitutional issues presented by [judicial fact-finding at sentencing] would have been avoided entirely" if the Guidelines were not binding because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." 543 U.S. at 233.

Mistretta, *Koon*, and *Booker* all spotlight that a constitutionally sound and practically sensible sentencing system is one in which the Federal Sentencing Guidelines enhance, rather than encumber, the judicial exercise of reasoned judgment at sentencing. And the text Congress set forth in 18 U.S.C. § 3553(a) details how the Guidelines should help inform, and not restrict, the assessment of "every convicted person as an individual and every case as a unique study in ... human failings." *Koon*, 518 U.S. at 113; *cf. United States v. Buchanan*, 449 F.3d 731, 741 (6th Cir. 2006)

(Sutton, J., concurring) (stressing that, after *Booker*, district courts "retain the ultimate authority within reason to apply the § 3553(a) factors to each criminal defendant.... The end is not process in itself but the substantive goal that trial judges exercise independent and deliberative judgment about each sentence—making these sentences more than an algebraic equation and less than a Rorschach test.").

This Court needs to ensure that circuit courts incorporate these long-standing federal sentencing principles into the application of reasonableness review after *Booker*. Lower courts should view and apply the Federal Sentencing Guidelines as helpful (but sometimes flawed) advice that can aid sentencing judges when exercising reasoned judgment in light of case-specific realities and broader norms. Unfortunately, despite the instructive statutory text of § 3553(a) and this Court's work in *Koon* and *Booker*, many circuit courts apparently believe the Guidelines should confine, rather than contribute to, the exercise of reasoned judgment at sentencing. The Court should use these cases to correct any approach to reasonableness review that, by thwarting the thoughtful exercise of reasoned judgment by district courts at sentencing, is constitutionally suspect and generally unwise.

A. The Virtues and Vices of Judicial Sentencing Discretion

1. Virtues of individualized and reasoned justice

A decade ago, this Court's unanimous *Koon* decision emphasized the importance of ensuring that district judges retain sufficient discretion under the Sentencing Reform Act of 1984 ("SRA") to impose individualized and reasoned sentences. *Koon* was an interpretation of the provisions of the SRA, and this Court highlighted that Congress in the SRA recognized "the wisdom, even the necessity, of sentencing procedures that take into account individual

circumstances." *Koon*, 518 U.S. at 92 (citing 28 U.S.C. § 991(b)(1)(B), which mandates that the Sentencing Commission create guidelines that "maintain[] sufficient flexibility to permit individualized sentences"). The *Koon* ruling stressed what the Sentencing Commission has always recognized: "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." *Id.* at 93 (quoting U.S. SENTENCING GUIDELINE MANUAL, Ch. 1, pt. A (1995)). Consequently, *Koon* set out an approach to departures and appellate review specifically designed to effectuate Congress's "intent that district courts retain much of their traditional sentencing discretion." *Id.* at 97.

In *Booker*, the importance of judicial sentencing discretion took on a constitutional dimension. The remedy in *Booker* preserved a place for judicial fact-finding within a guideline scheme by declaring the Guidelines "effectively advisory" (which necessarily must afford district judges even more sentencing discretion than they possessed under the SRA). The *Booker* Court's endorsement of judicial fact-finding in an advisory guideline system, while finding constitutional problems with such fact-finding in a binding system, is justified by the traditional understanding of sentencing as a distinctive enterprise involving the exercise of reasoned judgment. The *Booker* decision recognizes and safeguards an important constitutional distinction between (1) finding facts that increase a sentencing range set by a legislature or sentencing commission (a task for juries), and (2) exercising judgment based on the consideration of relevant sentencing factors (a task for judges). *See generally* Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 406-14 (2006) (elaborating on these points).

In short, the *Booker* merits opinion stands for the constitutional principle that sentencing judges can consider a range of facts at sentencing when judicial fact-finding done in service to reasoned judgment. And the *Booker* remedial

opinion explains that, with the Guidelines "effectively advisory," federal judges are required "to take account of the Guidelines together with other sentencing goals" Congress set forth in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 259. *Booker* thus now requires judges to exercise reasoned sentencing judgment by filtering the Guidelines' advice through the dynamic, multi-faceted, purpose-oriented provisions of § 3553(a).

After *Booker*, federal judges may no longer simply find Guideline-specified facts, plug these facts into a calculation, and then just follow the Guidelines' predetermined sentencing outcomes. As stressed in *Booker*, § 3553(a) instructs a judge to consider "the need to avoid unwarranted sentencing disparities" and the need for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 259-60 (quoting 18 U.S.C. § 3553(a)). Moreover, the central directive of § 3553(a) commands federal judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment while considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). Consequently, federal judges must now integrate and assimilate the facts emphasized by the Guidelines with the broader judgment-oriented considerations Congress set out in § 3553(a). In this way, *Booker* ensures that federal sentencing decision-making remains, in the words of the *Mistretta* decision, "close to the heart of the judicial function." 488 U.S. at 408.

2. Vices of unexplained (and perhaps unjustifiable) decisions by judges

As long recognized by Congress and this Court, district judges must possess a certain measure of case-specific

discretion to render individualized and reasoned sentencing justice. But unregulated and unreviewed discretion can permit (and shield from view) reason*less* sentencing decisions. Indeterminate federal sentencing practices suffered not simply from too much judicial discretion, but rather from a paucity of express principles, reasoning and accountability in the sentencing process. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-49 (1972) (lamenting "Law without Order or Limit" in Chapter 1 and "Walls of Silence" in Chapter 4); Senator Edward M. Kennedy, *Foreword* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977) (assailing disparity in the federal system before the SRA, but stressing that this "disparity cannot be traced to 'weak' judges": the "legislature ... must bear the blame" because Congress had not "built any standards or safeguards into the sentencing process").

Judge Frankel and Professor Morris advocated bringing reasoned law to sentencing through the development of principled rules and the review of the discretion exercised by sentencing judges. They stressed that judges should have to give reasons for their sentences and these reasons should be subject to scrutiny on appeal. By requiring reasoned and reviewable sentencing decisions, lawmakers could help ensure that each sentence would be imposed, in Judge Frankel's words, with "the maximum we can muster of rational thought, humanity, and compassion." FRANKEL, *supra*, at 124. Successful reforms not only bring more formal rules to sentencing, but also make decisions more reasoned, transparent, and open to appropriate scrutiny. *See generally* American Law Institute, *Model Penal Code: Sentencing*, Council Draft No. 1, § 102(2) (Sept. 27, 2006) (urging rules that preserve judicial discretion to individualize sentences "within a framework of law" and increase the transparency of sentencing decisions); The Constitution Project, *Principles for the Design and Reform of Sentencing*

Systems: A Background Report 16-18 (2006) (praising sentencing systems that, while retaining flexibility, guide decisions with legal principles and enhance transparency).

Congress in the SRA championed principled and transparent sentencing rules and the importance of requiring and reviewing reasons for the sentences that judges decide to impose. The SRA emphasizes four central sentencing purposes in 18 U.S.C. § 3553(a)(2) and throughout the rest of the Act. Notably, the primary statement of sentencing purposes appears in the SRA's instructions *to judges* concerning the "factors to be considered in imposing a sentence," *id.* § 3553(a), and the same statutory provision directs that a district court, "at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." *Id.* § 3553(c). The Senate Report discussing these provisions stresses that Congress intended to "require that *the judge consider* what impact, if any, each particular purpose should have on the sentence *in each case*." S. REP. NO. 98-225, at 77 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260. Of course, the original SRA also provided broad grounds for appellate sentencing review by both prosecutors and defendants, and Congress only a few years ago amended these appellate review provisions to make them more effective. *See* 18 U.S.C. § 3742; *see also* discussion of PROTECT Act, *infra*.

As evidenced by Congress's passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), even a complex sentencing structure can be refined to ensure the exercise of discretion is reasoned, transparent, and open to appropriate scrutiny. The PROTECT Act did not reject the long-standing principle that district judges must have sufficient sentencing discretion to impose individualized sentences. *See United States v. VanLeer*, 270 F. Supp. 2d 1318, 1319-26 (D. Utah 2003) (Cassell, J.) (stressing that PROTECT Act did not impact district courts' sentencing

discretion in most cases). Rather, the enacted provisions of the PROTECT Act reveal that Congress's chief concern was federal sentencing discretion hidden from appropriate and effective review. *See id.* at 1320-25 (detailing procedural focus of the PROTECT Act); *see also* William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43, 43 (2003) (stressing that PROTECT Act was "intended to improve the collection and sharing of sentencing data among Congress, the courts, the Sentencing Commission, and the Justice Department"); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 358, 366-69, 373 (2004) (explaining that "transparency and the rule of law, not national uniformity, [are] overarching purpose of the Guidelines system" and that the PROTECT Act's "most notable features of ... can be explained by reference to this objective" of enhancing transparency).[1]

Booker's revision to the operation of the Federal Sentencing Guidelines furthers the goal subjecting sentencing discretion to principled regulation and reasoned review. Rather than either sentencing-by-the-numbers or sentencing-by-the-seat-of-the-pants, *Booker* calls upon district courts,

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[1] Numerous provisions of the PROTECT Act reveal that this legislation was principally about making the exercise of discretion within the federal sentencing system more transparent and subject to effective review. *See* PROTECT Act, Pub. L. No. 108-21, § 401(c), 117 Stat. 650, 670 (requiring district judges to state departure reasons "with specificity in the written order of judgment and commitment"); *id.* § 401(m) (ordering the U.S. Sentencing Commission to produce a report on departures); *id.* § 401(*l*) (ordering the U.S. Attorney General to create new procedures for appealing departures); *id.* § 401(d) (providing for circuit courts to review departures more rigorously and with clearer standards); *id.* § 401(m)(2)(B) (creating a formalized and transparent framework for "early disposition" departures).

guided by the intricate directives set out by Congress in § 3553(a), to exercise independent reasoned judgment when imposing a sentence. Circuit courts, in turn, must ensure sentences are both reasoned and reasonable by evaluating, in light of the directives of § 3553(a), district courts' explanations offered in support of their sentencing decisions. This Court should clarify that *Booker* calls for the Courts of Appeals to police the exercise of reasoned judgment at sentencing by declaring suspect any and all sentencing decisions that fail to address thoughtfully the congressional directives of § 3553(a).

B. The Virtues and Vices of Sentencing Guidelines

1. Virtues of system-wide rules as starting points

Judge Frankel and Professor Morris urged the creation of sentencing guidelines because they recognized that, by requiring the formulation of explicit sentencing rules, a guideline system would facilitate the development of reasoned and principled sentencing law and procedures.[1] Reformers called for legislatures to set basic punishment goals and broad policy parameters—as it should within a democratic society—and then empower a specialized commission to work with judges to create more detailed system-wide sentencing rules. To borrow again the words of Norval Morris, a guideline system that engineered "the proper balance between legislative, administrative, and judicial discretion in sentencing," could help to "at last bring principle, coherence, predictability, and justice to sentencing criminal offenders." Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 285 (1977); *see also*

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[1] In the words of another early advocate of federal sentencing reform, sentencing guidelines were to provide a "way of introducing policy and purpose into what has largely been a normless sanctioning system." Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 368 (1989).

Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94-96 (1999) (discussing reformers' vision of a "sound institutional structure for addressing lawlessness in sentencing").

The Sentencing Reform Act of 1984 effectuated these goals by setting forth central principles and factors for district judges to consider in 18 U.S.C. § 3553(a) and also by creating the U.S. Sentencing Commission to develop detailed sentencing guidelines. As this Court recognized in *Mistretta*, Congress in the SRA set the essential parameters for a guideline system and then tasked the Commission with developing more intricate sentencing rules. *See Mistretta*, 488 U.S. at 374-79. The text of 18 U.S.C. § 3553(a) requires district courts to "consider" the Guidelines and policy statements issued by the Sentencing Commission, but it also requires district courts to consider other case-specific and purpose-oriented considerations. As mentioned before, through the statutory structure of § 3553(a), Congress intended to "require that *the judge consider* what impact, if any, each particular purpose should have on the sentence *in each case*." S. REP. NO. 98-225, at 77 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260.

Even after *Booker*, the Federal Sentencing Guidelines can, should, and inevitably will continue to play a major role in the federal sentencing process. No matter what this Court rules in these cases, probation officers will continue preparing presentence reports that still focus heavily on those sentencing factors—offense harms and criminal history—emphasized in the Guidelines. Moreover, examination and debate over Guideline issues can help ensure that district judges carefully examine the factual and legal issues raised in each case and should help ensure district judges never forget that every case is "a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime." *Koon*, 518 U.S. at 113. Guideline calculations often will provide a

useful starting point and framework for a sentencing judge and the parties to sort through the often complicated (and sometimes competing) facts and factors that arise in a particular case. Generally requiring basic Guideline calculations at the start of the sentencing process fosters a beneficial measure of procedural and substantive consistency: Guideline provisions can help frame, inform, and regularize the exercise of reasoned judgment by different sentencing judges across the nation.

2. Vices of unexplained (and perhaps unjustifiable) decisions by the Sentencing Commission

Though the Guidelines can and should aid the exercise of reasoned sentencing judgment, the Guidelines should not be elevated to an unjustified and unjustifiable sacrosanct status. After *Booker*, some lower courts appear to be clinging to the existing Guidelines like Linus clutching his security blanket. Disappointingly, circuit courts have not fully appreciated the importance of reasoned judgment at sentencing: they have insisted upon a Guideline-centric approach to post-*Booker* sentencing and continue to elevate some questionable Guideline diktats—such as whether DWI qualifies as a "violent felony" or whether loss was just less or more than $1,500,000—over reasoned and sound sentencing principles.[2]

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[2] Given the emphasis on objective variables and the need to reduce all sentencing factors to simple, round numbers, the Guidelines make innumerable arbitrary distinctions and focus excessively on precisely-quantifiable inputs. *See* Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 251-52 (2005); Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics, in A More Perfect System: Twenty-Five Years of Guideline Sentencing Reform*, 58 STAN. L. REV. 277 (2005). Some degree of artificial line-drawing is perhaps a necessary part of the guidelines-drafting process. But this reality underscores the need for judges to engage in thoughtful and reasoned decision-making on a case-by-case basis, so as to avoid the

Rather than attend to the statutory language requiring simply that the Guidelines be considered, the federal circuits have decreed that district judges must always calculate precise Guideline sentencing ranges and must still provide a detailed case-distinguishing justification for any deviation from the Guidelines. Many circuits have declared within-Guideline sentences "presumptively reasonable" and then have applied this presumption almost conclusively; even circuits formally rejecting such a presumption have affirmed nearly every within-Guideline sentence and have signaled that the Guidelines provide the safest of safe sentencing harbors for district courts. *See generally* Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Rita v. United States*, No. 06-5754 at Appendix (2006). Consequently, post-*Booker* circuit doctrines and practices encourage the sort of rote, mechanistic reliance on the Guidelines (with judicial fact-finding increasing sentencing ranges) that *Booker* found constitutionally problematic.

In addition to being constitutionally suspect, the circuit courts' presumption of reasonableness for within-Guideline sentences lacks a statutory foundation. Congress's nuanced sentencing instructions in § 3553(a) provide no textual basis for appellate courts to presume that all Guideline sentences are reasonable. In § 3553(a)'s detailed list of considerations, the Guidelines are just one factor among many—and not the first nor the most important one. The central command of § 3553(a) directs sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment. When developing and revising the Guidelines, the U.S. Sentencing Commission has never explored—nor even formally addressed—whether the Guidelines serve this parsimony mandate. In fact, the

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unjust and arbitrary sentences that might otherwise result from a rigid application of inevitably crude categories.

Commission has stated that certain Guidelines—such as the disparately harsh crack sentence provisions, and the severe career-offender enhancement—undermine the sentencing goals set forth by Congress in § 3553(a)(2). A blanket presumption of reasonableness for all within-Guideline sentences ignores the Sentencing Commission's informed and express determination that some Guidelines do not produce just and effective sentences in many cases.

The principles expounded in *Booker* suggest that appellate courts should reverse their post-*Booker* approach of presuming within-Guideline sentences "reasonable" and requiring a justification for any variation. In light of *Booker*'s Sixth Amendment holding and the text of the SRA, circuit courts arguably should presume that within-Guideline sentences are suspect unless supported by an explanation of how the goals of § 3553(a) are served by following the Guidelines.

An appellate "presumption of unconstitutionality" for within-Guideline sentences would respect the merits opinion in *Booker* by ensuring that sentences are not the result of rote judicial fact-finding usurping the jury's role, and it would also force district judges to carefully evaluate all the § 3553(a) factors in each individual case rather than simply assume the Guidelines always achieve statutory goals. Even when a district court has decided that it should regularly follow the advice that appears in the Guidelines, it is still absolutely essential in each individual case "that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review." Morris, *supra*, at 274. As interpreted by this Court in *Booker*, both the Constitution and the Sentencing Reform Act demand this much.

II. A STATEMENT OF MODERN FEDERAL SENTENCING PRINCIPLES

Whatever this Court rules, these cases will, both formally and informally, represent a statement of modern federal sentencing principles. Consequently, we urge this Court to emphasize the importance of a sentencing process that requires judges, in compliance with the directives of § 3553(a), to consider relevant factors through a transparent process of reasoned sentencing judgment.

Significantly, in those courtrooms and cases in which district judges have thoughtfully attended to the provisions of § 3553(a) after *Booker*, the move away from a Guideline-centric sentencing process has generally furthered, not frustrated, the goals pursued by Congress when it enacted the Sentencing Reform Act. The most thoughtful post-*Booker* district court decisions demonstrate that an emphasis on § 3553(a) can make federal sentencing decision-making more principled, even-handed, transparent and proportional by (1) improving the balance between the application of structured sentencing rules and judicial discretion; (2) improving the balance between the impact of judicial and prosecutorial discretion at sentencing; (3) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances; and (4) reordering outcomes so that defendants most deserving of reduced (or increased) sentences receive the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines. *See generally* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUSTON L. REV. 341, 347-55 (2006).

The Court might be concerned that, with an emphasis on the commands of § 3553(a) and on individual judges exercising reasoned judgment, there is an increased risk of sentencing disparity. Indeed, it is possible that the reasoned judgment of a federal district judge in Wisconsin may differ from the reasoned judgment of a judge in Utah or New York

or Nebraska. But there is considerable evidence that the pre-*Booker* Guideline-centric sentencing process may have undermined, rather than enhanced, the goal of greater sentencing consistency in the federal system. *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (arguing Guidelines *increased* sentencing disparity in the federal system); *see also* U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) (spotlighting Guidelines' inability to regulate prosecutorial discretion and noting increased impact of that presentencing discretion under the Guidelines).[3]

Perhaps more importantly, even though achieving greater sentencing consistency was one goal of the Sentencing Reform Act of 1984, it was not the only goal. The nuanced provisions of § 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed "the need to avoid unwarranted sentence disparities" as only one of seven distinct sentencing considerations. *Cf.* Morris, *supra*, at 274 ("[E]quality in punishment is not an absolute principle; it is a value to be weighed and considered among other values."); Kate Stith & Jose A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT'G REP. 187, 187 (1999) ("Uniform treatment ought to be *one* objective of sentencing, to be sure, but not the sole or overriding objective. A *just* sentence must also be a reasoned sentence and a proportional sentence, imposed through procedures that comport with our

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[3] Moreover, an undue emphasis on uniformity in the federal system may exacerbate unwarranted disparities on the local level as between federal and state sentences for the same criminal conduct. *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-35, 753-65 (2002).

basic understandings of due process of law in a constitutional system of checks and balances.").

Further, this Court's modern sentencing jurisprudence must be viewed as a dramatic and important statement that a range of values—such as our society's commitment to fair procedures, adversarial justice and the proper constitutional roles of juries and judges—needs to be balanced with and integrated into a modern quest for greater sentencing consistency. Absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without recognizing that a just sentencing system should also strive to be thoughtful and reasoned, humane and respectful to all persons it impacts. Developing post-*Booker* doctrines that encourage judges to exercise reasoned judgment focused on the provisions of § 3553(a) is a step in the right direction as a matter of federal sentencing policy as well as a matter of constitutional jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should resolve these cases in a manner that emphasizes the critical importance of judicial sentencing discretion and suggests the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.

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DECEMBER 18, 2006

274A

Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), either to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances or to presume that a within-Guidelines sentence is reasonable?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice and to ensure that criminal sentences are imposed and reviewed in a manner that comports with our Constitution. NACDL's intense concern for the fullest protection of fundamental Fifth and Sixth Amendment rights has led it to appear as *amicus curiae* in this Court on numerous occasions, including in *United States v. Booker*, 543 U.S. 220 (2005), *Blakely* v. *Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's position), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the provision of the Sentencing Reform Act requiring judges to sentence within the Guidelines range "[i]n most cases," *id.* at 234, because the Sixth Amendment prohibits a sentence "outside the range authorized by the jury verdict," *id.* at 240. After *Booker*, the district court chooses a sentence pursuant to 18 U.S.C. § 3553(a)—including its requirement, found in subsection (a)(4), that the court "consider" the applicable Guidelines range—and the court of appeals reviews that sentencing decision for reasonableness.

In the nearly two years since this Court remedied the Sixth Amendment violation in *Booker* by leaving the Guide-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

lines merely advisory, the Guidelines continue in practice to exert much the same force as before. The Department of Justice's litigation position is that the Guidelines should be applied as if *Booker* had never been decided. By directive from the Attorney General, "prosecutors must actively seek sentences within the range established by the Sentencing Guidelines *in all but extraordinary cases*." Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) at 2, *available at* http://sentencing.typepad.com/sentencing_law-_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (emphasis added); *id.* at 1 (prosecutors must "take all steps necessary to ensure adherence to the Sentencing Guidelines"). District judges are imposing Guidelines sentences at nearly the same rate they did when the unconstitutional system was in place.[2]

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[2] During FY 2003, when departures were reviewed for abuse of discretion, 7.5 percent of defendants received non-government-sponsored below-Guidelines sentences. Frank O. Bowman, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279, 306 (2006) (Table 3A). Statistics just released by the Commission show that this number increased to only 11.9 percent in FY 2006. U.S. Sentencing Commission, *Preliminary Quarterly Data Report, Preliminary Fiscal Year 2006 Data Through September 30, 2006*, at Table 1, *available at* http://www.ussc.gov/Blakely/Quarter_Report_4Qrt_06.pdf (combining departures and *Booker* variances; also showing that substantial assistance motions and so-called "fast track" dispositions account for almost 90% of government-sponsored downward departures). Significantly, this rate for all of FY 2006 is 0.5 percent *lower* than the rate for the first eight months of the year. U.S. Sentencing Commission, *Special Post-Booker Coding Project*, at 1 (July 6, 2006), *available at* http://www.ussc.gov/Blakely/-PostBooker_060106.pdf (showing 12.4 percent rate of non-government-sponsored below-Guidelines sentences for FY 2006 as of June 1, 2006). This trend is consistent with the "feedback" district judges are receiving from courts of appeals on the limited availability of non-Guidelines sentences even after *Booker*. *See infra*.

Of particular significance in the two cases now before the Court, courts of appeals have continued to give the Guidelines considerable weight by declaring that when a district court imposes sentence within the Guidelines range—a range calculated based on judicial factfinding under a lesser standard of proof—the sentence is presumptively reasonable. *See, e.g., United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006). Several of these courts, echoing the Government's litigation position, have also held that a judge may not vary substantially from such a range absent "extraordinary circumstances." *See, e.g., United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006) ("the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be"). As a result of these developments in the reasonableness review standard, many pertinent factors are deemed off-limits because the Sentencing Commission supposedly already has taken them into account. *See, e.g., United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (below-Guidelines sentence where defendant was the sole custodial parent of two small children was unreasonable, because "family ties and responsibilities" are an expressly "discouraged factor" under the Guidelines).

There are two fundamental defects with these standards of review. *First*, a requirement of extraordinary circumstances before a judge may substantially vary from the Guidelines range does more violence to the Sixth Amendment than the statute struck down in *Blakely*. The government has defended a Guidelines-centric approach to reasonableness review on the ground that the Guidelines already account for each of the Section 3553(a) factors and purposes a federal judge must consider before imposing sentence. But this Court considered and rejected a remedy that *would* have allowed that approach—factfinding by the jury.

Because judges continue to find facts that determine a Guidelines range, a requirement of extraordinary circum-

stances before a judge may substantially vary from the range suffers the same constitutional infirmity that led this Court to invalidate the mandatory Guidelines in *Booker*. This is because the difference between a Guidelines range based on judicial factfinding and the range authorized by the jury's findings can be considerable. *See, e.g.*, *Booker*, 543 U.S. at 228 (judicial factfinding increased the authorized sentence for Fanfan from a maximum of 78 months to a range of 188 – 235 months). Under the Washington law struck down in *Blakely v. Washington*, 542 U.S. 296 (2004), the judge was merely *allowed* to impose a sentence exceeding the maximum authorized by "facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. But to forbid substantial deviation from the Federal Guidelines range absent extraordinary circumstances is more detrimental to the defendant's Sixth Amendment rights than the Washington provision. The federal judge's findings of fact under the preponderance standard would *require* imposition of a sentence greater than that authorized by the jury's findings unless *the defendant* carries the burden of proving extraordinary mitigating circumstances. In the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present—the result *must* be a sentence that "the jury's verdict alone does not authorize." *Id.* at 305. Such a "remedy" is foreclosed by the Sixth Amendment. *Booker*, 543 U.S. at 234 (holding mandatory Guidelines unconstitutional because "the judge is bound to impose a sentence within the Guidelines range" in "most cases").

Second, even if *Blakely* and *Booker* could permit a system that heavily relies on class-wide parameters devised by an administrative agency, the empirical bases for both the "extraordinary circumstances" requirement and a presumption of reasonableness for Guidelines sentences (*i.e.*, the notion that the Commission has already accounted for all of the required factors and purposes in its Guidelines ranges) are demonstrably false. The Sentencing Commission decided it was not feasible to construct a system producing sentences designed to achieve the purposes of sentencing listed in Sec-

tion 3553(a)(2). Moreover, the Commission did not, because it could not, implement a system that differentiates between particular defendants based on the Section 3553(a) factors, most notably differences in the "history and characteristics" of otherwise similarly-situated defendants. *See* 18 U.S.C. § 3553(a)(1). Thus, there is no basis *in fact* for a court of appeals to presume that a sentence within the Guidelines range is reasonable or to require extraordinary circumstances before a judge may substantially vary from it.

The proper formulation of reasonableness review—a formulation that complies with the Sixth Amendment, is true to the language of the Sentencing Reform Act, and recognizes the limitations inherent in the Guidelines—is one that focuses on whether the district judge considered *all* of the statutory factors as they apply to that *particular* case. The court of appeals should also examine whether the judge, after considering those factors, complied with the duty to impose a sentence sufficient, but "not greater than necessary" to achieve the statute's purposes. 18 U.S.C. § 3553(a). This inherently individualized process is not aided by artificial generalizations about the appropriateness of a sentence range that was created for classes of cases and that was the product of an incomplete assessment of the very factors and purposes *judges* must consider on a case-by-case basis. To be faithful to the remedy in *Booker*, and in recognition of the inherent limitations of the Guidelines, neither the district courts nor the courts of appeals should give special weight to sentences that fall within the applicable Guidelines range.

ARGUMENT

I. A Requirement Of Extraordinary Circumstances For Substantial Variances From The Guidelines Is Inconsistent With This Court's *Booker* Decision.

The Eighth Circuit's principal basis for giving the Guidelines greater weight than the other Section 3553(a) fac-

tors—that they supposedly "were fashioned taking the other § 3553(a) factors into account and are the products of years of careful study," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006)—misses the point of *Booker*. This Court made clear that "the mandatory system" Congress enacted "is no longer an open choice." 543 U.S. at 263. The Court rejected the proposed remedy of jury factfinding, which would have allowed the Guidelines to retain their primary role in the sentencing process. Because judges continue to make the factual findings that determine a Guidelines range (or that permit deviation from it), the range must be no more than one factor among many that the judge should consider. Forbidding substantially higher or lower sentences absent a finding of extraordinary circumstances would reinstate a regime in which the Guidelines nearly always receive dispositive weight—a result irreconcilable with the Sixth Amendment right to jury findings.

The state law in *Blakely* limited a defendant's sentence to a "standard range," dictated by the offense of conviction, unless the judge found "substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299. This Court held that a sentence above the standard range, based on the judge's finding that Blakely had acted with deliberate cruelty, violated the Sixth Amendment because it exceeded the penalty the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

A requirement that a judge find the existence of extraordinary circumstances before imposing a sentence substantially above or below the presumptively reasonable Guidelines range suffers the same flaw that led this Court to vacate Blakely's sentence. Under the Eighth Circuit's test, a district court may not substantially deviate from the Guidelines range unless the judge finds facts that establish extraordinarily aggravating or mitigating circumstances. The less aggravating the circumstances found by the judge, for example, the lower the permissible increase in sentence. *See Claiborne*, 439

F.3d at 481 ("How compelling [the] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed."). It does not matter, for Sixth Amendment purposes, that judges have the flexibility to vary substantially from the range in *some* cases without making further factual findings. This Court held as much in invalidating the provision that made the Guidelines mandatory. *Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.") By definition, the circumstances in the majority of cases governed by a particular Guideline are not extraordinary, just as departures under the mandatory Guidelines were unavailable in "most cases." *Id.*[3]

The facts in *Booker* and *Fanfan* also illustrate the Sixth Amendment violation. Judicial factfinding increased Fanfan's penalty from a Guidelines range of 63 – 78 months to a range of 188 – 235 months. 543 U.S. at 228. Under a standard of review that is tied to the range determined under the Guidelines, a defendant such as Fanfan could receive a sentence at the higher range—a sentence substantially above the

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[3] It may well be that in theory a "presumption of reasonableness" for Guidelines sentences, by itself, does not raise these Sixth Amendment concerns if it it does not necessarily equate with a "presumption of *unreasonableness*" for *non*-Guidelines sentences. In practice, however, the two have gone hand in hand. *See, e.g., United States v. Bishop*, 2006 WL 3237027 at *10 (10th Cir. Nov. 9, 2006); *United States v. Rogers*, 448 F.3d 1033, 1034 (8th Cir. 2006) (per curiam); *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005). To be unobjectionable, any presumption on appeal must be limited to cases where the judge has followed the correct process—considering all factors and exercising his discretion to impose a sentence sufficient, but not greater than necessary to meet the purposes of Section 3553(a)(2). But if the district judge has improperly considered the Section 3553(a) factors by, for example, giving special weight to the Guidelines, the resulting sentence is not entitled to a presumption of reasonableness whether it is within the Guidelines or not. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

range authorized by the jury verdict—*only* if the judge makes additional findings. Thus, for the "ordinary" or typical defendant—one whose circumstances fall short of "extraordinary"—the district court not only is *permitted* to impose a sentence greater than that available based on jury findings alone; it is *required* to do so. The Sixth Amendment forbids either result. *See Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (emphasis in original)).

Claiborne involves a downward variance, but there is no reason to think that reasonableness review should mean one thing for upward variances and another for downward variances. *Booker* held to the contrary. 543 U.S. at 266 (rejecting the government's remedy because it "would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences" and "[w]e do not believe that such 'one-way lever[s]' are compatible with Congress' intent" (emphases and second alteration in original; citation omitted)).

The constitutional defect is further illustrated by considering how reasonableness review would apply to a sentence that is *at or above* the top of the range determined solely on the basis of facts found by the jury or admitted by the defendant, even though it may be *below* the range determined after additional findings by the judge. After *Booker* and *Blakely*, a district judge operating in a guidelines regime that uses judicial factfinding must have the discretion to impose such a sentence without the additional requirement that he go beyond the jury's findings. Thus, in such a case the sentence must be affirmed if the judge follows the statute's procedural requirements, complies with the Due Process Clause, and does not consider factors forbidden by the Constitution (such as the defendant's race). The sentence may not be reversed on the ground that there were insufficient mitigating factors. Reasonableness review must therefore give judges broad lati-

tude in choosing a sentence—a latitude that is inconsistent with the substantive requirement of extraordinary circumstances.[4]

Reasonableness review cannot mean one thing in cases where the judge's findings produce little or no increase in the Guidelines range and another thing when the range greatly exceeds that based on jury findings alone.[5] A unitary standard of reasonableness review must provide sufficient latitude to account for cases like Booker's and Fanfan's, where judicial factfinding and jury factfinding producing significantly different ranges. And although the need for such latitude would be the same even if such cases were rare, they are not. In drug cases, the "base" offense level is determined largely by the quantity of drugs deemed "relevant" under rules set forth in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 1B1.3. This "relevant"

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[4] This Court has held that judges may find facts that trigger a mandatory minimum sentence. *See Harris v. United States*, 536 U.S. 545 (2002). Even assuming that holding survives *Blakely* and *Booker*, *see Harris*, 536 U.S. at 569 (Breyer, J., concurring) (acknowledging that *Apprendi* "cannot easily" be distinguished), *Rangel-Reyes v. United States*, 547 U.S. __ (2006) (Stevens, J., statement respecting denial of petitions for writ of certiorari), it does not apply here, because judicial factfinding changes in tandem *both* the minimum *and* the maximum allowable sentence under the Guidelines. *Cf. Harris*, 536 U.S. at 557 (distinguishing *Apprendi*, because under 18 U.S.C. § 924(c), "the jury's verdict has authorized the judge to impose the minimum with or without the finding"; *Apprendi* does not apply to "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)"); *id.* at 561 ("The minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment.")

[5] Nothing in the statute or *Booker* contemplates that the meaning of "reasonable" will depend on the extent of the difference between the range based on jury findings and the range based on judicial findings. Moreover, a standard that varies in such a way would impose undue burdens on the lower courts and be exceedingly difficult to administer consistently in a system with 256 Guidelines range cells.

quantity includes drugs involved in counts that were dismissed, and even counts of which the defendant was acquitted or for which there was no charge at all. *See, e.g., United States v. Watts*, 519 U.S. 148 (1997) (per curiam). Moreover, the Guidelines Manual contains many more levels of gradation for drug quantity than does the statute defining the offense. *Compare* 21 U.S.C. § 841(b)(1) (containing three levels of penalty gradation due to drug quantity for most controlled substances, including cocaine, cocaine base (crack), heroin and marijuana) *with* USSG § 2D1.1(c) (containing at least 14 different offense levels for such drugs).[6] Approximately 35 percent of all federal sentences in 2005 were for drug offenses. U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics* ("2005 Sourcebook") at 13; *id.* at 313 (showing an increase in the percentage of drug cases after *Booker*). Many other Guidelines also dictate higher sentence ranges based on findings made by the judge rather than the jury, not the least of which are those for theft and fraud cases. *See* USSG § 2B1.1 (numerous aggravating factors incorporating the amount of loss); *2005 Sourcebook* at 13 (12 percent of cases).

Petitioner Rita's case illustrates how another type of judicial factfinding under the Guidelines—in which the judge uses a "cross reference" to sentence the defendant *as if* convicted of a *different* offense—can significantly increase the Guidelines range. Rita was convicted of perjury, false statements, and obstruction of justice. His offense level based on jury findings was 14. *See* USSG §§ 2J1.2 (obstruction of jus-

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[6] The Guidelines, rather than mandatory minimums, dictate the sentence in a large number of drug cases. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("*Fifteen Year Report*"), at 54 (2004), *available at* http://www.ussc.gov/15_year/15year.htm (determining that, as of 2001, more than 25 percent of the average expected prison time for drug offenders can be attributed to Guideline increases above the statutory mandatory minimum penalty levels).

tice) & 2J1.3 (perjury). But after the government's post-conviction proffer, accepted by the Probation Officer and subject to proof by only a preponderance of the evidence, Rita's Guidelines range was calculated as if he had been convicted of accessory after the fact to an offense that the grand jury was investigating—the purportedly illegal importation of goods by the company from which Rita made purchases—but with which Rita was never charged.

As Rita's brief explains, this cross reference to an offense supposedly committed by a non-party—an offense that was not at issue, much less proved, in Rita's trial—increased his offense level from 14 to 20, doubling both the minimum and maximum of his Guidelines range. With the type of reasonableness review adopted by several circuits, the jury findings alone—supporting a sentence of between 15 and 21 months—would not have authorized a sentence in the enhanced range used by the district judge. To get to that higher range a judge would need to make additional findings—either facts that change the Guidelines range or facts that support a finding of "extraordinary circumstances." Thus, "[t]he sentencing judge would have been reversed" had he imposed a sentence in that higher range without additional non-jury findings. *See Booker*, 543 U.S. at 234-35; *cf. id.* at 234 (noting that the statute in *Blakely* did not provide sufficient flexibility because the judge needed to find "substantial and compelling reasons" to vary from the range). This is precisely the type of sentencing regime that this Court invalidated as unconstitutional in *Booker* and *Blakely*.

On constitutional grounds alone, the standard of review used in the Fourth and Eighth Circuits must be rejected.

II. The History Of The Guidelines Demonstrates That Courts Should Neither Give Them A Presumption Of Reasonableness Nor Require Extraordinary Circumstances For Substantial Variances.

As noted earlier, the Eighth Circuit's presumption of reasonableness for all within-Guidelines sentences is grounded in the belief that the Guidelines take the other Section 3553(a) factors into account and are "the product of years of careful study." 439 F.3d at 481. Even if it were possible after *Booker* to give the Guidelines special weight, the premises on which the court have done so are demonstrably false. The Guidelines were not written to produce sentence ranges that meet all of the purposes of sentencing found in Section 3553(a)(2), much less do they differentiate individual defendants from one another based on all of the other factors a judge must consider under Section 3553(a). And while it is true that the Commission's amendment process was designed to carry out a continued refinement of the Guidelines to better approach the ideal regime envisioned by the drafters of the Sentencing Reform Act, in practice it has not performed in that manner. Rather than move the Guidelines in the direction of balancing and incorporating Section 3553(a)'s purposes and factors, the amendment process has had the opposite effect. Thus, as an empirical matter, sentence ranges that are the product of such a process are not entitled to a presumption of reasonableness.

A. The Sentencing Guidelines And The Ranges They Produce For Individual Cases Do Not Incorporate All Of The Sentencing Purposes Or Factors Set Forth In 18 U.S.C. § 3553(a).

The Commission's current Chairman has recently declared that the Guidelines embody each of the sentencing factors set forth in 18 U.S.C. § 3553(a) for every offense and every offender. *See* Testimony of Hon. Ricardo H. Hinojosa,

before the House Subcommittee on Crime, Terrorism, and Homeland Security (Mar. 16, 2005), at 18, *available at* http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf ("The guidelines embody all of the applicable sentencing factors for a given offense or offender.") That simply is not so. The Commission itself acknowledged, when first promulgating the Guidelines, that it was impossible to devise a guidelines system that captures and accounts for "the vast range of human conduct potentially relevant to a sentencing decision." USSG ch. 1, pt. A(4)(b) (1987). "[T]he guidelines are inescapably generalizations" that "say little about the 'history and characteristics of the defendant.'" *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez, J., dissenting). The Guidelines are entitled to no special weight because they *do not*—and indeed *cannot*—produce sentence ranges that account for each of the various factors and purposes a court must consider when imposing sentence.

1. The Sentencing Guidelines were not written to ensure that a within-Guidelines sentence complies with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Section 3553(a)(2) of Title 18 requires judges to impose sentences that, among other things, "comply with" the following "purposes" of sentencing in each particular case: "reflect the seriousness of the offense"; "promote respect for the law"; "provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Act directed the Commission to devise Guidelines appropriate for "categories of offenses," 28 U.S.C. § 994(c), and "categories of defendants," *id.* § 994(d), recognizing that guidelines could not address the circumstances of every individual. The Guidelines were to be addressed to the purposes of sentencing and the reduction of

unwarranted disparities." *Id.* § 994(f). The sentencing judge, by contrast, was to consider those same matters, 18 U.S.C. § 3553(a)(2), (4), (5), (6), *and also* "the nature and circumstances of the offense" and the "history and circumstances of the offender." 18 U.S.C. § 3553(a)(1).

In the introduction to the first Guidelines Manual in 1987, the Commission acknowledged it was unable to take each of these purposes of sentencing into account in crafting Guidelines ranges. *See* USSG ch. 1, pt. A(3) (1987). The Commission only considered trying to account for two purposes, which it described as "just deserts" [sic] and "crime control." *Id.* It candidly acknowledged, however, that because it was unable to tackle the "profoundly difficult" "philosophical problem" of reconciling the interplay of even *those* two sentencing purposes, *id.*, it simply abandoned their use in favor of a system based "by and large, [on] typical past practice, determined by an analysis of 10,000 actual cases." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988) (footnote omitted). As another original commissioner explained, "[r]ather than being guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard 'fiddling with the numbers' that established the guidelines sentences." *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121, 18,122 (May 1, 1987).

In the end, the Commission chose to increase sentences for some offenses, but not others, through a series of "'trade-offs' among Commissioners with different viewpoints." Breyer, 17 Hofstra L. Rev. at 19; *id.* at 23 ("[O]nce the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad").[7] Al-

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[7] Over time, these "trade-offs" have worked to substantially lengthen sentences. Defendants sentenced in 2002 will spend, on average, twice as long in prison as those sentenced prior to the Sentencing Reform Act.

(footnote continued on next page)

though the Commission may very well have done the best it could under the circumstances, it is abundantly clear that the ranges in that Manual are *not* the product of a balancing of the sentencing purposes every judge is required to consider under Section 3553(a)(2).

2. The Guidelines ranges do not account for important Section 3553(a) factors.

In addition to their failure to take account of—much less carefully balance—each purpose of sentencing listed in Section 3553(a)(2), the Guidelines also fail to differentiate between defendants with respect to the other Section 3553(a) factors that judges must consider. Of particular note, they do not do so with respect to a vital component of subsection (a)(1)—the "history and characteristics of the defendant."

From the beginning, the Guidelines have produced sentencing ranges that take into account one narrow slice of a defendant's "history and characteristics": the aggravating factor of prior criminal history. *See generally* USSG ch. 4. The Guidelines ranges do not incorporate any other offender characteristics or any other aspects of their history. Instead, to the extent the Commission has addressed these factors, it expressly discourages or outright prohibits judges from considering them when computing a Guidelines range or when

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(*footnote continued from previous page*)

Fifteen Year Report at 46, 47, and 49. As a result, the federal prison population has increased four-fold during that same period. *Compare* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics - 1988*, Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, D.C.: USGPO (1989) *with* Federal Bureau of Prisons, Quick Facts, *available at* http://www.bop.-gov/news/quick.jsp#1. In fact, despite Congress's directive that the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g), as of 2004 the federal prisons were 40% over capacity. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, *available at* http://ojp.usdoj.gov/-bjs/pub/pdf/p04.pdf.

deciding whether to impose a Guidelines sentence. These characteristics include, among others, family ties and obligations, USSG § 5H1.6, military service, *id.* at § 5H1.11, community good works, *id.*, addictions and other dependencies, *id.* at § 5H1.4, and duress relating to "personal financial difficulties and economic pressures upon a trade or business," *id.* at § 5K2.12. The original commissioners "extensively debated" whether the Guidelines ranges should be affected by offender characteristics beyond the defendant's criminal record, Breyer, 17 Hofstra L. Rev. at 19, but they were unable to reach a consensus and therefore decided "to leave other characteristics out." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 185 (1999).

The Commission's inability to incorporate these offender characteristics into the computation of a Guidelines range is not surprising, because guidelines can only go so far in producing ranges that take these considerations into account. The one factor the Commission did incorporate—prior criminal history—is, in a number of ways, susceptible to an objective formula based on the number of prior convictions, the recency of past offenses, and their severity (as measured by length of sentence imposed or served). It is *not* possible to quantify in a meaningful way—*i.e.*, one that differentiates defendants in the current grid of sentence ranges—such factors as a defendant's family obligations; the influence of addiction, duress, or financial difficulties on the commission of the offense; or the degree to which the defendant engaged in good works before or after committing the offense. Moreover, an offender characteristic that warrants a significant sentence reduction in one case (*e.g.*, a history of strong family ties and responsibilities) might be less compelling than otherwise would be the case if coupled with other factors (*e.g.*, the defendant made a calculated decision to entice close family members into joining his criminal activity despite having a strong support system that gave him ample opportunity to lead a law-abiding life). Because the weight to be given any particular offender characteristic requires careful case-by-case consideration of the interplay of multi-

ple factors, such characteristics are inherently unsuited to the generalizations required in any guidelines system.

As a result of the difficulty in accounting for offender characteristics in a system that must quantify and generalize factors, with the exception of the aggravating factor of criminal history the Guidelines are focused *entirely* on the offense as opposed to the person who committed it. But even there they frequently fail to differentiate based on such things as criminal intent.[8] To the extent intent is considered, it works in only one direction. Intended harms increase the sentence even if they do not occur. *See, e.g.*, USSG § 1B1.3(a)(3) (relevant conducts includes "all harm that was the object" of acts and omissions) & 2D1.1. cmt. n.12 (drug quantity includes amounts attempted or agreed upon). Yet no reduction is made to account for harms that were unintended or controlled by law enforcement. *See, e.g., id.* (addressing controlled drug deliveries); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (noting that loss amount in many fraud cases "is a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence"). In failing to differentiate between defendants based on these and other aspects of their offenses, the Guidelines cannot be said to already account for the factors in Section 3553(a)(1).

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[8] Several guideline provisions require rigid arithmetic increases for acts that were committed (including the resulting "harm") without regard to *mens rea*. For example, the Guideline for unlawful possession of a firearm, used in 10.6 percent of all federal criminal cases, *2005 Sourcebook* at 60, mandates a two-level increase if the firearm illegally possessed by the defendant "was stolen," and a four-level increase if it "had an altered or obliterated serial number," USSG § 2K2.1(b)(4), "whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number," *id.* at cmt. n.8(B). *See also id.* at § 2J1.2(b)(1)(B) (compelling the same twelve-level increase for defendants who know their false statements were made in connection with a terrorism investigation and those who were unaware of the nature of the investigation).

Another statutory factor that judges must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Minimizing such disparities was one of the primary objectives of the Sentencing Guidelines. Guidelines, at least in theory, enable judges to give the same weight to factors common to "categories" of defendants who commit the same crime in the same manner. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(d), (f). For example, all bank robbers start at a single base offense level. And, all other things being equal, the defendant who commits his offense in a more aggravated manner than others (such as injuring a teller during the robbery) is placed in a higher range. But in a number of ways the Guidelines have perpetuated and even aggravated the problem of unwarranted disparities.

As the Sentencing Commission has recognized, "unwarranted disparity" means the "different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Fifteen Year Report* at 113 (emphasis in original). The Guidelines, by limiting consideration of numerous factors and circumstances (including the offense and offender factors mentioned above), have increased the second type of unwarranted disparity—the like treatment of cases that are not truly alike. Ilene Nagel, one of the original commissioners, acknowledged this problem—she dubbed it the "overreaching uniformity" of the Guidelines—noting that "the emphasis [in creating the first set of guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 934 (1990).

The Guidelines also suffer severe shortcomings in addressing the other type of disparity—different treatment of individual offenders who are similar in relevant ways. One of the biggest causes of *this* type of disparity is the practice

of charge and fact bargaining in connection with guilty pleas. Numerous studies have confirmed that because such bargaining occurs in a sizable number of cases, Guidelines ranges for defendants who should be identical in the eyes of the Guidelines will often be different. For example Professor Stephen Schulholfer and former-Commissioner Nagel found that the Guidelines were circumvented in approximately twenty to thirty-five percent of all plea-bargains, Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290 & n.25 (1997), with the extent of the deviations from appropriate guideline calculations ranging between "modest" (ten to twenty-five percent) and "enormous" (seventy to ninety percent), *id.* at 1292. Similarly, the federal probation offices in forty-three percent of all districts report that when "guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case" *no more than half* the time. *Fifteen Year Report* at 86 (internal quotations and citations omitted). And in yet another survey, this one conducted by the Federal Judicial Center, three-quarters of district judges reported that plea bargaining is a "source of hidden unwarranted disparity in the guidelines system." Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 7, 9 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf.

Ironically, it is the so-called "real offense" provisions (*e.g.*, the weapon and quantity enhancements in drug cases and the loss amount for economic crimes)—the centerpiece of guidelines sentencing, *see, e.g.*, *Fifteen Year Report* at 24-25—that provide the most fertile ground for abusive plea negotiating tactics. *See* Nagel, 80 J. Crim. L. & Criminology at

937.[9] The Justice Department's continued insistence after *Booker* that prosecutors avoid sentences outside the ranges that have been computed, and standards of review that treat non-Guidelines sentences as suspect, can only serve to perpetuate this form of disparity.

Perhaps the most troubling manifestation of unwarranted sentencing disparity prevalent in the current guidelines system is the gap between average sentences of white and minority offenders. "[R]elatively small in the preguidelines era," this gap has grown substantially since the advent of the Guidelines. *Fifteen Year Report* at 115, 116, 120-27. The Commission itself has concluded that these disparities are not "a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges"; rather they are attributable to an "'*institutional unfairness' built into the sentencing rules themselves*." *Id.* at 135 (emphasis added) (internal citation omitted). Although the Commission specifically identified the 100:1 quantity ratio for powder and crack cocaine—a ratio that substantially increased petitioner Claiborne's Guidelines range—and the career offender Guideline as rules that have "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing," it acknowledged there may be "many others." *Id.* at 131-34. A Guidelines system that *increases* racial disparities in sentencing cannot be given a presumption of reasonableness.

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[9] Further aggravating the disparities inherent in plea bargaining is the existence of regional "'adaptations' to the guidelines system," including "fast-track" disposition programs. *Fifteen Year Report* at 86; *see also* U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf ("Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.")

Congress recognized that judges would need to consider more than the kinds of unwarranted disparity against which Guidelines can protect. It thus required them to "consider" the problem of disparity, 18 U.S.C. § 3553(a)(6), *in addition to* consideration of the Guidelines range, in each individual case. The assumption that the Guidelines account for this and other Section 3553(a) factors thus cannot be squared with the structure of the statute, any more than it can be squared with the way the Guidelines have been created.

B. The History Of The Guideline Amendment Process Has Further Undermined Any Argument For A Presumption Of Reasonableness.

The second reason advanced by the Eighth Circuit in *Claiborne* for according within-Guidelines sentences a presumption of reasonableness was that the Guidelines have been refined over time based on several years of sentencing experience and studies. 439 F.3d at 481. While Congress, the Commission, and even this Court envisioned such a data-driven evolution of the Guidelines, *see Mistretta v. United States*, 488 U.S. 361, 379 (1989); 28 U.S.C. § 994(o), in practice the amendment process has proven incapable of incorporating Section 3553(a)'s purposes and other sentencing factors into the Guidelines.

When the original Commission determined it could not base its Guidelines ranges on a principled application of the statutory purposes of sentencing listed in Section 3553(a)(2), it intended to make up for that shortcoming in later revisions to the Manual. The Commission saw its original product as "but the first step in an evolutionary process." USSG ch. 1, pt. A(3) (1987). The Guidelines were to be refined along two fronts by: (1) incorporating the findings of the Commission's "continuing research, experience, and analysis," *id.* at pt. A(2); and (2) developing a sentencing "common law," whereby judges would "remain free to depart from the Guidelines' categorical sentences," transmitting their reasons for doing so to the Commission, which would then revise the

Guidelines to incorporate the common practices of the judiciary. Breyer, 11 Fed. Sent. R. at 183, 185 (the original choices were to be "subject to revision in light of Guideline implementation experience"); *see also Booker*, 543 U.S. at 263. Experience, however, has not measured up to expectations.

1. Changes to individual provisions have not addressed the failure of the Guidelines to account for and balance the multiple statutory purposes of sentencing.

The Commission's plan to incorporate the purposes of sentencing into later versions of the Guidelines Manual was doomed from the start. The tradeoffs stemming from the original commissioners' failure to reach consensus resulted in a system bereft of a coherent sentencing philosophy, much less one that bore some relationship to the purposes of sentencing set forth in the Sentencing Reform Act. "Without an agreement on the purposes of sentencing, there was no way for the Commission to measure sentences against particular objectives." *United States v. Jaber*, 362 F. Supp. 2d 365, 374 (D. Mass. 2005). The Commission has made a number of separate amendments to individual Guidelines, but it has yet to make the kind of structural changes needed to implement the statutory purposes of sentencing. In fact, the amendment process has been notable for its relentless addition of factors that serve to increase offense levels and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants.

The Guidelines have been amended 696 times. USSG App. C (2006). Only a handful of these changes have operated to decrease the length of certain sentences. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(A)*, 30 Champion 32 at n.39 (2006) (identifying only seven such amendments: USSG App. C, amends. 396, 488,

515, 590, 624, 632, and 634). The cumulative effect of the remaining changes has been a "one-way upward ratchet" in sentencing, Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005), a result roundly criticized.[10]

This consistent increase in the length of prison sentences has not been accompanied by empirical data that tie the increases to the purposes of sentencing. *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 56 (1998) ("Nowhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of the rationale for the particular approaches or definitions adopted by the Commission; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors."). Even the criminal history provision—the single offender characteristic accounted for in the Guidelines—does not produce results that can be presumed "reasonable." Due to "pressing congressional deadlines," the Commission was unable to validate its criminal history measure with its own

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[10] *See, e.g., Fifteen Year Report* (Sentencing Commission) at 137-38 (discussing the negative impact of "factor creep" on the Commission's efforts to tie offense levels to offense seriousness); Jeffrey S. Parker (Former Deputy Chief Counsel to the Commission) & Michael K. Block (Former Commissioner), *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (noting that the Commission has lapsed into enacting "gratuitous increases in punishment levels that ha[ve] no basis in either principle or practice, and instead [are] essentially political decisions reflecting responses to interest group pressures"); *id.* at 1033-34; Judge Marvin Frankel, *Keynote Address: Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L. J. 2043, 2046 (1992) ("I think everyone here knows that the judges find the guidelines excessively harsh and rigid . . . . The guidelines are indeed severe . . . ."); Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting at 4 (Aug. 9, 2003) ("The Federal Sentencing Guidelines should be revised downwards."), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

empirical studies. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* ("*Measuring Recidivism Report*") at 1 (2004), *available at* http://www.ussc.gov/publicat/recidivism_general.pdf. Instead, it relied on a hodge-podge of preexisting tools, reasoning that their combined predictive power would transfer, "at least in part, to the nascent guidelines' criminal history measure." *Id.* The Commission intended to follow up with its own research to test the correlative value between its criminal history scoring system and recidivism. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 44 (1987).

The Commission conducted and publicized this promised analysis seventeen years later. *See Measuring Recidivism Report*. It demonstrates in quite compelling fashion that many of the offender characteristics the Commission has ruled off-limits—age, educational level, employment status, and so on—are indeed strong predictors of recidivism rates. *See id.* at 16 ("Investigations using the recidivism data suggest that there are several legally permissible offender characteristics which, if incorporated into the criminal history computation, are likely to improve predictive power.").[11] Yet the ranges computed under the Guidelines do not account for any of these offender characteristics.[12]

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[11] For example, the Commission found that recidivism rates are strongly correlated to age (35.5% for offenders under 21 versus 9.5% for offenders over 50), educational level (31.4% for offenders with less than a high school education versus 8.8% for offenders with a college degree), employment status (32.4% for offenders who were not steadily employed in the year before their arrest versus 19.6% for offenders who were steadily employed during this period), and marital status (31.4% for offenders who were never married versus 13.8% for married offenders and 19.5% for offenders who were formerly married). *Id.* at 12-14.

[12] The problem is magnified by the Commission's initial decision to deviate upward from the "historical averages" for a particular category of defendants—those who had previously received probationary sentences

(*footnote continued on next page*)

2. The Sentencing Guidelines have not been refined to reflect developments in the sentencing "common law."

The development of the sentencing "common law" has also fallen short of expectations, largely because the Commission has favored like treatment of dissimilar cases over a system that gives district judges the flexibility to take all factors into account. In the early years of Guidelines sentencing, judges began the dialogue envisioned by the original Commission by departing from the Guidelines where the ranges did not adequately account for the individualized circumstances of the cases before them. But, as one commentator recently noted, "the idea that feedback from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guidelines range have come to be viewed as illegitimate, even deviant." Bowman, 43 Hous. L. Rev. at 321.

Contributing in no small part to this development was the Commission's reaction to the initial feedback it received from sentencing judges. At least three times during the early years of the Guidelines, the Commission adopted amendments that discouraged, or outright prohibited, departures in reaction to sentences imposed in one or two isolated cases. *See* Douglas A. Berman, *Distinguishing Offense Conduct and*

(*footnote continued from previous page*)

for "certain economic crimes," USSG ch. 1, pt. A(4)(d) (1987)—notwithstanding Congress's directive that the Guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). Although the Commission's own findings from the recidivism data support the creation of a "first offender" criminal history category that would carry out the directive in Section 994(j), *see* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004), *available at* http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf., the Guidelines have not been amended to do so.

Offender Characteristics in Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 284 & n.33 (2005) (tracing the 1991 amendment to § 5H1.4, which discourages departures based on "[p]hysical condition or appearance," to *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), and the 1992 addition of § 5H1.12, which prohibits departures based on "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," to *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991) (tracing the 1991 addition of § 5H1.11, which discourages the consideration of a defendant's military service, civic contributions, charitable activities, and "other similar prior good works," to *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990), and *United States v. Pipich*, 688 F. Supp. 991 (D. Md. 1988)).

The Commission has also tried to impose uniformity in situations where the rate of downward departures reflects the view that a particular Guidelines range often calls for a sentence greater than necessary to serve the purposes of sentencing. Instead of giving judges greater flexibility to take into account the factors motivating downward departures, the Commission has reacted by severely curtailing—or eliminating altogether—sentence reductions based on the cited factor. For instance, the high rate of downward departures in career offender cases has long been a symptom of the shortcomings in that Guideline. U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* (Mar. 2006) ("*March 2006 Booker Report*") at 137 (showing non-government-sponsored downward departures in 10% of cases between October 2002 and April 2003). Part of the explanation is that the Commission's expansive definition of predicate "crimes of violence" equates defendants with truly violent histories and those who have com-

mitted much less serious offenses.[13] The Commission responded to these frequent downward departures from the career offender guideline by severely and categorically limiting their magnitude. USSG App. C, amend 651 (2003) (adding USSG § 4A1.3(b)(3)(A), which limits downward departures based on overstatement of the criminal history of career offenders to a single criminal history category). As a result, district judges continue to find it necessary to sentence below the Guidelines range in a significant number of career offender cases. *See March 2006 Booker Report* at 137 (showing sentences imposed below the career offender Guidelines range, without government sponsorship for such a variance, in 21.5 percent of cases).

The problem lies not in the Commission's failure to produce Guidelines ranges that presumably account for all of Section 3553(a)'s factors and purposes in any given case; the problem lies in the unrealistic expectation that a system of detailed guidelines such as those the Commission promulgated is *capable* of doing so. In any given sentencing proceeding, the factors a judge must consider are numerous, and the interplay of those factors with each other and with the purposes of sentencing is complex. Further complicating matters, many of those factors and purposes cannot be quantified or otherwise converted to a form in which they possess

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[13] The list of "crimes of violence" treated on the same level as murder, rape and armed robbery includes tampering with a motor vehicle, *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); driving while intoxicated, *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc); fleeing and eluding, *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006); mere possession of a short-barreled shotgun, *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005); operating a motor vehicle without the owner's consent, *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005); failing to return to a halfway house, *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002); car theft, *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002); burglary of a non-dwelling, *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); and oral threatening, *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

a common denominator. Thus, even if the factual input is accurate, a Guideline computation gives a judge nothing more than the ability to compare a limited number of factors in one case to the same categories of factors in other cases. That computation is inherently incapable of producing a presumptively accurate "answer," however, because such a computation cannot take into account much of the input necessary to the process.

As a result of the inherent limitations of any guidelines system, and the demonstrated limitations of the one in place, a reviewing court should not presume that a Guidelines sentence is reasonable, much less should it require extraordinary circumstances to impose a sentence that varies substantially from the Guidelines.

III. Reasonableness Review Must Operate Without Giving The Guidelines Range Special Weight.

In clarifying "review for reasonableness," this Court and the courts of appeals must avoid characterizations that give the Guidelines any greater weight or prominence than other sentencing factors. In light of the *Booker* remedy for the Sixth Amendment defect in the Guidelines, the sentence that a judge is permitted to impose must not be dependent upon whether it is in close proximity to the Guidelines range. With Section 3553(b)(1) excised, the statute places no special weight on the Guidelines, a result also consistent with the fact that the Guidelines do not—and cannot—produce sentence ranges that take account of each factor and purpose a judge is required by law to consider.

District judges, free of the duty to give the Guidelines special prominence, will regain the ability to follow Section 3553(a)'s directive to take into account *all* of the statutory factors on a case-by-case basis, in order to arrive at a sentence "sufficient," yet "not greater than necessary," to achieve each statutory purpose of sentencing. In circuits that continue to give the Guidelines special status, district judges are unable to carry out this duty. Instead, as was the case

when Section 3553(b)(1) remained in effect, the courts of appeals frequently reverse below-Guidelines sentences because the district judge relied on a factor that failed to meet the test for downward departures. *See United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (below-Guidelines sentence based on the defendant's cooperation was unreasonable, because that "departure" exceeded the Guidelines' limits on "substantial assistance" downward departures); *United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (reversing below-Guideline sentence based on the defendant's efforts to obtain employment, his level of education, the non-use of a firearm, and his likelihood of contributing to society, because those factors are excluded from the Guidelines).

Ironically, if the government's version of reasonableness review prevails, judges will have less flexibility than when the guidelines were first promulgated as binding directives. This Court then recognized the district courts' "institutional advantage over appellate courts" in determining how cases compare to one another. *Koon*, 518 U.S. at 98 (1996) (explaining that district courts "see so many more Guidelines cases than appellate courts do"). "[T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*; *see also United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989) ("District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case.")

By giving the Guidelines special, nearly conclusive, weight, the courts of appeals have deprived district judges of the opportunity to decide the appropriate weight of that factor on a case-by-case basis, informed by their institutional advantage in evaluating the full mix of sentencing factors presented in each particular case. In some instances, the judge will find it appropriate to give the Guidelines significant weight be-

cause the other factors point to the same result. In other cases, the judge will determine that the Guidelines should be given little weight because other important factors point to a different result, a sentence that may be either higher or lower than the Guidelines range. To say that courts should "presume" the other factors will align with the Guidelines is—to put a twist on Justice Scalia's analogy—as useful as presuming that the use of a large amount of one ingredient in every recipe will result in an appetizing dish.[14] The mix of other factors present in each case will dictate the degree to which the court should rely on the Guidelines; a presumption is not useful when the mix of those factors can and will vary from one case to the next. "Importantly, there is no assumption here that a guidelines sentence complies with the purposes of the sentencing statute. Instead, that compliance must be tested by consideration of the multiple factors set forth in the sentencing statute, with particular attention to the factors identified by the parties in their arguments." *Jiménez-Beltre*, 440 F.3d at 526 (Lipez, J. dissenting).

For district judges to exercise their traditional sentencing discretion, consistent with both the Sentencing Reform Act and the Sixth Amendment, they must be able to consider each sentencing factor, along with the various purposes of sentencing, unhampered by artificial presumptions about the reasonableness of a within-Guidelines sentence.

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for proceedings consistent with the limited role the Sentencing Guidelines may play after *United States v. Booker*.

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[14] Justice Scalia criticized the majority's selective excision of provisions from the Act, concluding it "is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion." *Booker*, 543 U.S. at 307 (Scalia, J., dissenting).

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December 18, 2006

974 B

(4)

Supreme Court, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

No. 06-5618

In the Supreme Court of the United States

MARIO CLAIBORNE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the district court's choice of below-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL has an interest in this case insofar as it will determine whether sentences constituting "a substantial variance" from the advisory-guidelines range must be "justified by extraordinary circumstances." We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that the courts of appeals review sentences for unreasonableness in order to assess whether they are "sufficient, but not greater than necessary" to comply with the purposes of sentencing, as required by 18 U.S.C. § 3553(a) (commonly referred to as the "parsimony provision").

To assist this Court, NYCDL has undertaken an analysis of all post-*United States v. Booker*, 543 U.S. 220 (2005), reasonableness review cases captured by its search

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[1] Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from Respondent has been submitted concurrently with this filing. No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

terms (described in the appendix attached hereto ("App.")), from January 1, 2006 through November 16, 2006.[2] The complete results of NYCDL's work should help this Court appreciate the ways in which reasonableness review has been applied by the courts of appeals. The data show that courts of appeals have affirmed the vast majority of upward variances and within-guidelines sentences, while reversing almost all below-guidelines sentences appealed by the government—a pattern flatly inconsistent with the statute's parsimonious mandate.

SUMMARY OF ARGUMENT

Congress requires a district court at sentencing to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in the Sentencing Reform Act. 18 U.S.C. § 3553(a). In determining such a sentence, the district court must "consider" seven factors, only one of which is the guidelines range. At sentencing in this case, the district court addressed each of the four statutory purposes[3] and "consider[ed]" the seven statutory factors that aid a district court in selecting the parsimonious sentence. Even though the district court expressly complied with Section 3553(a), the Eighth Circuit declared Mr. Claiborne's sentence

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[2] The starting date was chosen to avoid the need to filter out the large number of early post-*Booker* decisions that did not involve unreasonableness review, but instead addressed issues such as whether a pre-*Booker* sentence should be vacated and remanded for resentencing in light of *Booker*. The end date is shortly after this Court granted certiorari in this case. *See* App. at 1a n.1. NYCDL's appendix is also available at http://www.nycdl.org.

[3] The purposes of paragraph (2) are "the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

unreasonable. In the Eighth Circuit—and in the other courts of appeals—that is not uncommon.[4]

NYCDL's database indicates that the courts of appeals are inherently skeptical of sentences that—like Mr. Claiborne's—are below the range suggested by the guidelines, even when these sentences otherwise appear to comply with all the provisions of Section 3553(a). This skepticism is reflected in a series of decisions in which the circuits are regularly reversing nearly every below-guidelines sentence appealed by the government, even when the district court's judgment reflects thoughtful consideration of the facts and law.

This trend of reversals of district court discretionary judgments about the application of the factors set out in Section 3553(a) in part reflects the judicially-created requirement that sentences outside of the guidelines be justified by unusual or unique—or in this case "extraordinary"—circumstances. This requirement, however, is without basis in the text, which assigns no hierarchy to the factors district courts are to "consider," and does not comport with Section 3553(a)'s parsimonious mandate.

The extra-textual requirements that some circuits have imposed for below-guideline sentences fail to acknowledge the research and insights of the United States Sentencing Commission, which has identified a variety of flaws in the guidelines system, based upon its study of 15 years of guidelines sentencing. The Commission's own analytical reports document the guidelines' inability to consistently achieve the purposes of sentencing identified by Congress in

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[4] Although "[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow," *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006), the courts have been near unanimous in their distaste for below-guidelines sentences. That is likely not what this Court contemplated in crafting the *Booker* remedy. *See* 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure.").

Section 3553(a), and indicate that guidelines sentences are often greater than necessary to comply with these purposes.

In fact, the reasons the district court articulated to justify Mr. Claiborne's 15-month sentence—(1) the guidelines range placed too much significance on drug quantity for a low-level offender; (2) the total absence of criminal history suggested a low likelihood of recidivism; and (3) the guidelines' extremely harsh approach to crack offenses relative to powder cocaine—involve guidelines issues that the Commission has repeatedly identified as problematic.

ARGUMENT

Notwithstanding the plain text of Section 3553(a), the courts of appeals have created two extra-textual requirements for the review of sentences after *Booker*. First, seven courts of appeals have expressly adopted a presumption that within-guidelines sentences are reasonable, which at least implicitly connotes that sentences outside the guidelines are less likely to be reasonable. Second, nearly all of the circuits have held that the more a district court varies from the advisory-guidelines range, the more extraordinary the circumstances, as articulated by the district court in support of its non-guidelines sentence, must be. Neither requirement finds any support in the text or in the Sentencing Commission's own analysis of how the guidelines serve (and often fail to serve) the purposes of sentencing set forth by Congress. These requirements strongly discourage district courts from exercising the sentencing discretion that this Court deemed constitutionally essential in *Booker*.

I. THE COURTS OF APPEALS HAVE REVERSED NEARLY ALL OF THE BELOW-GUIDELINES SENTENCES APPEALED BY THE GOVERNMENT

NYCDL's database shows that, even though Section 3553(a) commands district courts to impose sentences "not greater than necessary" to accomplish Congress's

articulated purposes of sentencing, the vast majority of below-guidelines sentences appealed by the government have been declared unreasonable by courts of appeals. The frequency of these reversals casts doubt on whether the courts of appeals are attentive to the statutory text of Section 3553(a) that *Booker* said should guide reasonableness review.

Overall, in the universe of cases examined in the NYCDL study, the courts of appeals declared unreasonable and vacated *60* of *71* below-guidelines sentences appealed by the government (and 47 of these sentence reversals—out of 51 cases appealed by the government—were in those circuits that expressly presume within-guidelines sentences to be reasonable). *See* App. at 2a-3a. These reversals of district judges' decisions to impose below-guidelines sentences suggest a general resistance to and intolerance of any district court judgment to impose a sentence below the guidelines.

In sharp contrast, the NYCDL study reveals that the circuits are showing considerable deference to district court decisions to increase sentences above guidelines ranges—despite the mandate in Section 3553(a) to impose parsimonious sentences. In the cases analyzed in the NYCDL study, the courts of appeals declared only seven of 154 above-guidelines sentences appealed by defendants unreasonable (and those circuits formally adopting a presumption of reasonableness for within-guidelines sentences affirmed 83 of the 88 above-guidelines sentences appealed by defendants). *See* App. at 2a-3a.

The reasonableness review outcomes in the Eighth Circuit, which reversed Mr. Claiborne's sentence, are emblematic of these non-parsimonious patterns. Although the Eighth Circuit purports to apply reasonableness review in a fashion "akin to ... review for abuse of discretion," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), the cases captured by NYCDL's database tell a different story when the circuit reviews a district court's exercise of sentencing discretion to select a below-guidelines sentence.

For sentences *below* the advisory-guidelines range, the Eighth Circuit's review is deferential in theory but intolerant in practice. The court has found *unreasonable and vacated 27 of 28 below-guidelines sentences appealed by the government.* *See* App. at 4a, 137a-41a. And, in the only other case in the study in which a panel approved a district judge's below-guidelines sentence (despite the government's appeal), the full court *vacated* the panel decision and is rehearing the case *en banc*. *See United States v. Burns*, 438 F.3d 826 (8th Cir.), *vacated by* 2006 U.S. App. LEXIS 12239 (8th Cir. May 18, 2006).[5] On the other hand, the Eighth Circuit has been highly deferential to sentences *within* and *above* the guidelines range: it has affirmed 116 of 118 within-range sentences and has affirmed 21 of 22 above-guidelines sentences appealed by defendants. App. at 4a, 132a-34a, 141a-59a.

The Eighth Circuit's decisions to vacate below-guidelines sentences appealed by the government often state that the circumstances cited by the district court were not sufficiently "extraordinary" to justify the sentence's downward variance from the presumed reasonable guidelines range. *See, e.g., United States v. Beal*, 463 F.3d 834, 836-38 (8th Cir. 2006); *United States v. Bryant*, 446 F.3d 1317, 1319 (8th Cir. 2006); *United States v. Bueno*, 443 F.3d 1017, 1024 (8th Cir. 2006); *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006); *United States v. Gatewood*, 438 F.3d 894, 896-97 (8th Cir. 2006); *United States v. Givens*, 443 F.3d 642, 645 (8th Cir. 2006).

Notably, the Eighth Circuit's inconsistent approach to reasonableness review impacts its assessment of the extent of variances from the guidelines as well as the direction of

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[5] In addition, in the *only* below-guidelines sentence appealed by the government and affirmed as reasonable, *United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006), the Eighth Circuit remarked that "[t]his case presents an unusual scenario. If we were only considering the characteristics of each defendant and the extent of his or her co-operation, *we would likely reverse*." *Id.* at 829 (emphasis added).

these variances. Despite repeatedly asserting that extraordinary variances require extraordinary justifications, the Eighth Circuit has affirmed at least nine sentences that imposed imprisonment terms *more than double* the bottom of the advisory range, including one in which the bottom was *nearly tripled.*[6] In at least eight cases, the Eighth Circuit affirmed sentences that added five or more years of imprisonment to the bottom of the guidelines range.[7] By contrast, the court has declared unreasonable at least 13 downward variances of less than five years.[8] App. at 132a-34a, 137a-41a.

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[6] *United States v. Lyons*, 450 F.3d 834 (8th Cir.) (from 70 to 180 months), *cert. denied*, 127 S. Ct. 358 (2006); *United States v. Mallory*, 2006 WL 2441577 (8th Cir. 2006) (from 27 to 60 months); *United States v. Maurstad*, 454 F.3d 787 (8th Cir. 2006) (from 41 to 120 months); *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (from 180 to 270 months); *United States v. Porter*, 439 F.3d 845 (8th Cir. 2006) (from 57 to 120 months); *United States v. Nelson*, 453 F.3d 1004 (8th Cir. 2006) (from 4 to 24 months); *United States v. Porchia*, 180 Fed. Appx. 596 (8th Cir. 2006) (from 6 to 24 months); *United States v. Larison*, 432 F.3d 921 (8th Cir. 2006) (from 5 to 60 months); *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006) (from 6 to 18 months). Perhaps because the majority of within-guidelines sentences imposed nationwide are set at the bottom of the guidelines range, the Sentencing Commission's statistical analysis typically compares sentences to the bottom of the applicable range. *See* U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006. NYCDL followed this methodology in its analysis.

[7] *Lyons*, 450 F.3d 834 (increase of more than 9 years); *Maurstad*, 454 F.3d 787 (increase of more than 6.5 years); *Meyer*, 452 F.3d 998 (increase of 7.5 years); *Porter*, 439 F.3d 845 (increase of 5 years); *United States v. Hawkman*, 438 F.3d 879 (8th Cir.) (increase of more than 5 years), *cert. denied*, 127 S. Ct. 281 (2006); *United States v. Sitting Bear*, 436 F.3d 929 (8th Cir. 2006) (increase of more than 6 years); *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (increase of more than 6 years); *United States v. Larrabee*, 436 F.3d 890 (8th Cir. 2006) (increase of 14.5 years); *United States v. Hacker*, 450 F.3d 808 (8th Cir. 2006) (increase of more than 7 years).

[8] *United States v. Smith*, 450 F.3d 856 (8th Cir. 2006) (from 262 to 204 months); *United States v. Medearis*, 451 F.3d 918 (8th Cir. 2006) (from 46 to 0 months); *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006) (from 12

The data from the Eighth Circuit are hard to square with the parsimony provision. The presumption of reasonableness for within-guidelines sentences and the requirement that variances from the guidelines be justified by increasingly extraordinary circumstances in practice treats with disfavor only those sentences below the advisory-guidelines range.

A. The Types Of Sentences Found Unreasonable Suggest That Courts Are Not Attentive To The Text Of Section 3553(a)

The text of Section 3553(a) is plain: Congress has instructed that a district court "*shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)"; and that, in reaching that determination, the court *shall* consider six additional factors, only one of which is the advisory-guidelines range. Nothing in the statute allows for one of the factors that a court must "consider" to become the benchmark by which all other decisions are judged. There is no textual basis for demanding that the applicable guidelines range serve as the gravitational center for all sentencing determinations.[9] *See generally* Brief of New

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to 0 months); *United States v. Rogers*, 448 F.3d 1033 (8th Cir. 2006) (from 51 to 12 months); *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006) (from 30 to 0 months); *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006) (from 70 to 12 months); *United States v. Myers*, 439 F.3d 415 (8th Cir. 2006) (from 37 to 12 months); *Claiborne*, 439 F.3d 479 (from 37 to 15 months); *United States v. Gatewood*, 438 F.3d 894 (8th Cir. 2006) (from 63 to 36 months); *United States v. Shafer*, 438 F.3d 1225 (8th Cir. 2006) (from 63 to 48 months); *United States v. McMannus*, 436 F.3d 871 (8th Cir. 2006) (from 57 to 24 months); *United States v. Bryant*, 446 F.3d 1317 (8th Cir. 2006) (from 70 to 30 months); *United States v. Givens*, 443 F.3d 642 (8th Cir. 2006) (from 24 to 0 months).

[9] *See, e.g., United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006) ("It is worth noting that a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)(2). Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished its task.").

York Council of Defense Lawyers, as Amicus Curiae Supporting Petitioner, *Rita v. United States*, No. 06-5754 at 9-15 (2006) ("Brief for NYCDL, *Rita*").

Requiring any special showing or some form of "extraordinary circumstances" to justify a sentence below the advisory guidelines conflicts with the statute's multi-dimensional list of sentencing factors, and also directly conflicts with the parsimony provision that Section 3553(a) sets forth as a district court's guiding directive. The text makes plain that a court must impose a lower sentence if the higher sentence is greater than necessary in light of the purposes of sentencing *even if* the higher sentence is suggested by the guidelines. *Nothing* in the statute remotely suggests that faced with a decision whether to impose a higher guidelines sentence or a lower sentence that would serve the purposes of sentencing, the court must impose the guidelines sentence in the absence of some special or extraordinary circumstances. The statute requires compliance with the parsimony directive and simply calls upon district courts to "consider" the guidelines in their efforts to follow that directive.

B. The Courts Of Appeals' Approach To Reasonableness Review Has Failed To Take Into Account The Commission's Findings That The Guidelines Are Not Parsimonious And Often Fail to Achieve Congress's Purposes

In their guideline-centric approach to reasonableness review, the courts of appeals have ignored critical information from the Sentencing Commission about how the guidelines were promulgated, the factors they take into account (and fail to take into account), and evidence showing how poorly the guidelines can sometimes function in practice. *See generally* Brief of NYCDL, *Rita*, at 19-23 (citing United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment Of How Well The Federal Criminal Justice System Is Achieving The Goals Of Sentencing Reform 144 (2004) ("USSC Assessment Report")).

In addition to general problems with the guidelines in operation, which are documented by the Sentencing Commission and discussed more fully in Brief of NYCDL, *Rita*, the guidelines have two additional shortcomings that are particularly relevant to Mr. Claiborne's case. First, the Commission itself has determined that its Criminal History Category I overstates the criminal tendencies and likelihood of recidivism for a true first-time offender like Mr. Claiborne. *See* U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines 15 (2004) (concluding that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates"); *see also* Department of Justice, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories* (1994) (noting that under the guidelines system "low-level," first time drug offenders, who are least likely to recidivate after release, often get sentences that "overlap with defendants who had much more significant roles in the drug scheme").

Second, the Commission has after extended study emphatically stated that it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress." United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 91 (May 2002) ("Cocaine and Federal Sentencing Policy"). The Commission has repeatedly explained why the crack guidelines recommend sentences, especially for low-level offenders like Mr. Claiborne, which are systematically far greater than necessary to comply with the purposes of sentencing.

Under the guidelines, a crack cocaine offender receives the same base offense level as a powder cocaine offender who possesses 100 times more cocaine. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table). This provision dramatically increases sentences for those convicted of crack cocaine offenses and has its most significant impact in

cases involving low-level offenders like Mr. Claiborne. "According to the Department of Justice, defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 13.6 months, just over one year. In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of *64.8 months, over five years.*" Cocaine and Federal Sentencing Policy at 98 (emphasis in original). The guidelines actually have the effect of increasing the "penalty gap" even more dramatically for those offenders—like Mr. Claiborne—with the lowest quantities and least criminal history. *Id.* at iv; *see also id.* at 99 (discussing 8.3 to 1 penalty ratio for crack cocaine and powder cocaine offenders with the lowest drug quantities and the least criminal history (Criminal History Category I)).

C. The Circuits Have Been More Deferential To *Upward* Variances Than Downward Variances, A Pattern Inconsistent With Parsimony And The Commission's Findings

Courts have generally affirmed upward variances for certain factors while disapproving downward variances based on *the very same reasons.* For example, in *United States v. Shaw*, —F.3d—, 2006 WL 3505339, at *4 (10th Cir. 2006), the court affirmed a substantial upward variance imposed to match a co-defendant's higher guidelines sentence, but in *United States v. Khan*, 461 F.3d 477, 500 (4th Cir. 2006), the Fourth Circuit vacated a below-guidelines sentence imposed to avoid disparities between co-defendants. *See also United States v. Thurston*, 456 F.3d 211 (1st Cir. 2006) (vacating below-guidelines sentence imposed by district court in part to avoid unwarranted disparity between co-defendants).[10]

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[10] Congress, in its statutory instruction to judges, lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as only one of the seven distinct sentencing considerations. *See* 18 U.S.C. § 3553(a)(6). Some courts of appeals justify placing primacy significance on the

A similar pattern has emerged in the consideration of a defendant's criminal history. In *Terrell*, for example, the Tenth Circuit rejected the defendant's argument that the criminal history computation overstated the seriousness of his record, and held that the guidelines adequately take such considerations into account. 445 F.3d at 1265. In *Shaw*, however, the Tenth Circuit affirmed an *upward* variance from the guidelines minimum of 57 months to a sentence of 105 months and described the guidelines criminal history calculation as a mere "technical computation [that] did not adequately capture the seriousness of Shaw's record." 2006 WL 3505339, at *2.

The Eighth Circuit too has approved substantial *upward* variances in a large number of cases where the district court found that the guidelines did not adequately capture the severity of the offender's criminal history. *See, e.g., Lyons*, 450 F.3d 834 (affirming upward variance from 70 to 180 months based on criminal history and likelihood of recidivism); *Mallory*, 2006 WL 2441577 (same; from 27 to 60 months); *Maurstad*, 454 F.3d 787 (same; from 41 to 120 months); *Porter*, 439 F.3d 845 (same; from 57 to 120 months); *United States v. Chase*, 451 F.3d 474 (8th Cir. 2006) (same; from 57 to 96 months); *Hacker*, 450 F.3d 808 (same; from 92 to 180 months); *Porchia*, 180 Fed. Appx. 596 (same; from 6 to 24 months); *Hawk Wing*, 433 F.3d 622 (same; from 6 to 18 months). By contrast, it has held unreasonable a significant

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guidelines ranges by asserting that the guidelines best take this factor into account. *See, e.g., United States v. Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006) (the presumption of reasonableness of a guidelines sentence, "simply reflect[s] that the Guidelines are generally an accurate application of the factors listed in § 3553(a)"); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) ("This court, too, has consistently emphasized, even post-Booker, that 'the purpose of the Guidelines [is] to promote uniformity in sentencing so as to prevent vastly divergent sentences for offenders with similar criminal histories and offenses.'") (citation omitted); *United States v. Johnson*, 445 F.3d 339, 342 (4th Cir. 2006) (same). Nonetheless, these same circuits invoke factor (a)(6) to affirm above-guidelines sentences or reverse below-guidelines sentences. *See, e.g., Shaw*, 2006 WL 3505339.

number of below-guidelines sentences in which the district court concluded that the guidelines overstated the offender's criminal history. *See, e.g., United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006) (vacating below-guidelines sentence imposed by district court based on low likelihood of recidivism); *Ture*, 450 F.3d 352 (vacating below-guidelines sentence for first-time offender); *Gall*, 446 F.3d 884 (criminal history); *United States v. Feemster*, 435 F.3d 881 (8th Cir. 2006) (age and criminal history); *United States v. Lee*, 454 F.3d 836 (8th Cir. 2006) (criminal history); *United States v. Bradford*, 447 F.3d 1026 (8th Cir. 2006) (age and criminal history); *United States v. Brinton*, 436 F.3d 871 (8th Cir. 2006) (criminal history).

When courts of appeals vacate below-guidelines sentences and approve of within- and above-guidelines sentences, they discourage district courts from complying with the parsimony provision Congress set forth in Section 3553(a) and from giving due consideration to all of the statutory factors (rather than only the guidelines range), as this Court has held the statute requires. *See Booker*, 543 U.S. at 259-60 ("The Act ... requires judges to take account of the Guidelines *together with other sentencing goals* ... . [It] requires judges to consider the Guidelines ... [range], the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, ... [and] the need to provide restitution to victims.") (citation omitted and emphasis added); *see also id.* at 260 (noting that the Act also "*requires* judges to impose sentences that reflect" the purposes of sentencing enumerated in Section 3553(a)(2)(A)-(D)) (emphasis added).

II. THE COURT OF APPEALS ERRED WHEN IT REVERSED MR. CLAIBORNE'S SENTENCE

At Mr. Claiborne's sentencing, the district court took account of the various Section 3553(a) factors and considered the advisory-guidelines range. The court articulated its reasons for imposing the sentence, and those reasons are amply supported by the record. Among other things, the court considered the nature and magnitude of the offense;

its personal assessment of Mr. Claiborne, including what was necessary to create the best chance for successful rehabilitation; his drug treatment, job, and family history; and the court's experience with similarly-situated defendants. *See* JA 71-72.

Based on the totality of the sentencing record, the court found that a 15-month sentence would constitute adequate punishment, would be commensurate with the sentences of other similarly-situated defendants in the same court, and would facilitate rehabilitation. The district judge also concluded, conversely, that a guidelines sentence would be "tantamount to throwing [Mr. Claiborne] away"—that is, greater than necessary to comply with the purposes of sentencing. JA 72. The district court's sentencing judgment is an impressive example of the kind of "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing," which this Court has said is entitled to substantial deference. *Koon v. United States*, 518 U.S. 81, 98 (1996); *see also* S. Rep. No. 98-225, at 52 (1983) (before imposing a sentence, "the judge" must consider "the nature and circumstances of the offense"); *id.* at 53 ("the judge" must undertake "a comprehensive examination of the characteristics of the particular offense and the particular offender").

In particular, the district court found that the applicable guidelines range overstated Mr. Claiborne's criminal tendencies. Mr. Claiborne was a true first offender with no prior convictions. As noted above, the Sentencing Commission's reports and analysis *actually support*—rather than contradict—the district court's decision to take that factor into account. *See* Measuring Recidivism at 15 (concluding that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates").[11]

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[11] The advisory nature of the guidelines—and the controlling authority of Section 3553(a)'s parsimony provision—makes this case different from

The district court also took into account the small drug quantity and that Mr. Claiborne was a low-level offender. The judge found that the quantity of drugs did not justify the penalty suggested by the guidelines; and, comparing Mr. Claiborne with other offenders the judge had sentenced for offenses involving much larger quantities of drugs, the judge found the guidelines' suggested sentence greater than necessary. This analysis was entirely consistent not only with its discretionary authority, but also with the Commission's findings that the guidelines' reliance on quantity over other more relevant factors fails in some cases to reflect the relative harmfulness of the crime, USSC Assessment Report at vii; that the most significant flaw in the quantity-based approach and the resultant sentences suggested by the guidelines grids is that quantity is "a particular poor proxy for the culpability of low-level offenders," *id.* at 50; and that the crack/powder disparity is not justified by any legitimate sentencing goals and that "the current penalty structure's almost exclusive reliance on quantity-based penalties to account for the entirety of the harms ... fails to provide adequate sentencing

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Koon in that respect. In *Koon*, this Court found that the offender's low likelihood of recidivism "was not an appropriate basis for departure." 518 U.S. at 111. The district court had granted a departure because, "within Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly unlikely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent 'to a degree' not contemplated by the Guidelines." *Id.* (quoting district court opinion). That is precisely the rationale employed by the district court in Mr. Claiborne's case. In *Koon*, however, this Court rejected the district court's rationale because it "failed to account for the Commission's specific treatment of this issue." *Id.* But now, the Commission's treatment of criminal history is not dispositive. "The guidelines—being advisory—are no longer decisive as to factors any more than as to results." *United States v. Smith*, 445 F.3d 1, 3 (1st Cir. 2006); *Booker*, 543 U.S. at 305 n.3 (Scalia, J., dissenting in part) ("[The Commission's] policy decisions are no longer mandatory, [and] the sentencing judge is free to disagree with them.").

proportionality," Cocaine and Federal Sentencing Policy at 101.

The district court sentenced Mr. Claiborne to 15 months' imprisonment after engaging in precisely the kind of nuanced and reasoned approach to sentencing that the statute requires. Every aspect of the sentencing process was reasoned, and by any common understanding "not unreasonable." Nevertheless, the Eighth Circuit rejected the district court's assessment and analysis and declared the below-guideline sentence unreasonable. That was wrong. The Eighth Circuit's requirement of "extraordinary circumstances" to justify this sentence finds no basis in the text of the statute and conflicts with the Commission's own reports. In addition, district courts are indisputably far better qualified and uniquely equipped to make the kinds of individualized determinations required to fashion an appropriate sentence. *Koon*, 518 U.S. at 98-99 ("District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more [sentencing] cases than appellate courts do."). They also have "special competence [] about the ordinariness or unusualness of a particular case." *Id.* at 98-99 (quotation omitted).

CONCLUSION

For these reasons, the court of appeals decision vacating Mr. Claiborne's sentence should be reversed.

Respectfully submitted,

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APPENDIX

SUMMARY OF FINDINGS

Nearly two years ago, this Court held in *United States v. Booker*, 543 U.S. 220 (2005), that requiring judges to impose sentences pursuant to the then-mandatory sentencing guidelines was unconstitutional. To solve this problem, the Court excised the provision making the guidelines mandatory, 18 U.S.C. § 3553(b); deemed the guidelines "effectively advisory"; directed district judges to make sentencing decisions based upon all the factors in Section 3553(a); and instructed the courts of appeals to review sentences for "unreasonableness."

When *Booker* was decided, "no one kn[ew] ... how advisory Guidelines and 'unreasonableness' review w[ould] function in practice." 543 U.S. at 311 (Scalia, J., dissenting in part). Now, however, a body of data revealing how courts of appeals have applied *Booker*'s standard has emerged. *Amicus curiae* New York Council of Defense Lawyers has analyzed this information, conducting a survey of cases from January 1, 2006 through November 16, 2006, in which the courts of appeals engaged in reasonableness review.[1]

The survey was conducted using Westlaw. Two date-restricted searches were used. The first, broader search, was designed to capture all cases that cited this Court's decision in *Booker*. The terms used were: Booker & Reasonab! Unreasonab!. This search returned approximately 2,800 cases. The second search was crafted to capture those cases (mostly unpublished dispositions) in which the courts of appeals applied unreasonableness review, but did not cite *Booker*. The terms used were: Sentenc! /3 Guideline / 20 Reasonab! Unreasonab! (#Not /3 Reasonab!) & Da (Aft 12/31/2005) % Booker. This search yielded approximately 250 cases.

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[1] The starting date was chosen to avoid the need to filter out the large number of early post-*Booker* decisions that did not involve review for reasonableness, but instead addressed issues such as whether a pre-*Booker* sentence should be vacated and remanded for resentencing in light of *Booker*.

Counsel for the NYCDL reviewed the cases and entered relevant information into a database. The categories of information compiled included: (1) case name and citation; (2) type of crime;[2](3) advisory guideline range; (4) sentence;[3] (5) whether the sentence was within, above, or below the advisory range; (6) whether it was the government or the defendant that appealed; (7) whether the sentence was affirmed or reversed; (8) whether the government or the defendant prevailed in the appeal; and (9) if the sentence was vacated, whether the basis was procedural or substantive.

Counsel excluded from the database all cases that included the search terms but did not actually engage in reasonableness review. For example, cases involving appellate review of pre-*Booker* sentences for plain error remands were not included. Likewise, cases in which the court of appeals remanded solely because the advisory guideline range was not calculated properly were excluded. At the conclusion of the review, NYCDL's database included 1,515 cases. The database is included in this appendix for the Court's review.

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The results of NYCDL's analysis of the 1,515 cases in the database are briefly summarized below.

- 154 cases involved sentences above the guidelines that were appealed by the defendants;
- Nearly all of these above-guidelines sentences were affirmed; only 7 were vacated;
- 60 of 71 below-guidelines sentences appealed by the Government were vacated as unreasonable;
- There were also 138 below-guidelines sentences appealed by defendants, and zero were found to be

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[2] Crimes were grouped as follows: D = Drugs; I = Immigration; T = Theft/Fraud offenses; F = Firearms; S = Sex crimes; and O = Other.

[3] The sentence refers to the number of months of imprisonment reflected in the court of appeals' opinion exclusive of any terms of supervised release, home confinement, fines, or other sentencing terms.

unreasonable;

- Of the remaining 1,152 within-guidelines sentences appealed by defendants, 16 sentences were vacated;
- 15 of the reversals were for procedural reasons, almost uniformly that the district court failed to articulate its reasons for the sentence; and
- Only 1 within-guidelines sentence was found to be substantively unreasonable.

NYCDL then broke down these findings by circuit, according to whether the circuit has explicitly held that a sentence imposed within a properly calculated advisory-guidelines range is presumed to be reasonable. The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have explicitly adopted this presumption of reasonableness. In these circuits:

- 93 were appeals by the defendant of an above-guidelines sentence;
- 88 of these sentences were affirmed; only 5 were vacated;
- There were 51 below-guidelines sentences that were appealed by the Government;
- Nearly all of these sentences (47) were vacated; and
- Of the remaining 693 within-guidelines sentences appealed by the defendants, only 7 were vacated.

In circuits that have not explicitly adopted a presumption of reasonableness—the First, Second, Third, Ninth, and Eleventh Circuits—the findings are as follows:

- 61 above-guidelines sentences were appealed by the defendants;
- Virtually all of these sentences were affirmed; only 2 were vacated;
- 20 below-guidelines sentences were appealed by the government and 13 were vacated; and
- Of the remaining 459 within-guidelines sentences appealed by the defendants, 9 were vacated.

Mr. Rita's case was appealed from the Fourth Circuit. In that circuit, there were:

- 201 within-guidelines sentences appealed by the defendants;
- All 201 of these sentences were found to be reasonable;
- There were 10 appeals by defendants of above-guidelines sentences;
- Only 1 sentence was vacated;
- The government appealed 9 below-guidelines sentences; and
- All 9 of these below-guidelines sentences were found to be unreasonable.

Mr. Claiborne's case was appealed from the Eighth Circuit. The data from that circuit show the following:

- There were 118 within-guidelines sentences appealed by the defendants;
- Only 2 of these sentences were vacated;
- 1 reversal was based on an inadequate explanation by the district court, and the other remains the only case in which a circuit court has found a within-guidelines sentences to be substantively unreasonable;
- There were 22 appeals by defendants of above-guidelines sentences;
- Nearly all of these sentences were affirmed; only 1 was vacated;
- The government appealed 28 below-guidelines sentences;
- Nearly all of these sentences were reversed; 27 of these below-guidelines sentences were found to be unreasonable; and
- In *United States v. Burns*, 438 F.3d 826 (8th Cir. 2006), a panel of the Eighth Circuit, affirmed a below-guidelines sentence, notwithstanding the government's appeal. The full Eighth Circuit has since vacated the panel decision and reheard the case *en banc*. *See* 2006 U.S. App. LEXIS 12239 (8th Cir. May 18, 2006).

RESULTS FOR CIRCUITS THAT HAVE EXPLICITLY ADOPTED A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES

Cir.	Above-guidelines sentences appealed by defendants and vacated	Within-guidelines sentences appealed by defendants and vacated	Below-guidelines sentences appealed by the government and vacated
4	1/10	0/201	9/9
5	1/28	0/86	5/5
6	2/17	1/91	1/2
7	0/8	1/86	4/6
8	1/22	2/118	27/28
10	0/8	3/108	1/1
DC	0/0	0/3	0/0
Total	5/93	7/693	47/51

RESULTS FOR CIRCUITS THAT HAVE NOT EXPLICITLY ADOPTED A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES

Cir.	Above-guidelines sentences appealed by defendants and vacated	Within-guidelines sentences appealed by defendants and vacated	Below-guidelines sentences appealed by the government and vacated
1	1/3	0/30	4/4
2	0/6	1/60	2/3
3	0/10	1/71	1/1
9	1/19	6/107	1/3
11	0/23	1/191	5/9
Total	2/61	9/459	13/20

FIRST CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Abad-Reyes, 187 Fed. Appx. 6 (1st Cir. 2006)	I	1-7	24	A	D	A	G	
U.S. v. Scherrer, 444 F.3d 91 (1st Cir. 2006)	T	?-63	96	A	D	A	G	
U.S. v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006)	O	0-6	48	A	D	R	D	S
U.S. v. Meran, 463 F.3d 47 (1st Cir. 2006)	D	108-135	75	B	D	A	G	
U.S. v. Griffin, 187 Fed. Appx. 13 (1st Cir. 2006)	D	210-262	198	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McGuire, 185 Fed. Appx. 15 (1st Cir. 2006)	D	360-life	300	B	D	A	G	
U.S. v. Caraballo, 447 F.3d 26 (1st Cir. 2006)	D	151-188	108	B	D	A	G	
U.S. v. Thurston, 456 F.3d 211 (1st Cir. 2006)	T	63-78 (60 stat max)	3	B	G	R	G	S
U.S. v. Smith, 445 F.3d 1 (1st Cir. 2006)	D	100-125	46	B	G	R	G	S
U.S. v. Pho, 433 F.3d 53 (1st Cir. 2006)	D	87-108	64	B	G	R	G	S
U.S. v. Lewis, 433 F.3d 53 (1st Cir. 2006)	D	235-293	188	B	G	R	G	S
U.S. v. Fanfan, 2006 WL 3217712 (1st Cir. 2006)	D		210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hernandez, 2006 WL 3041972 (1st Cir. 2006)	F	180 (minim um)	188	W	D	A	G	
U.S. v. Jahagirdar, 2006 WL 2988661 (1st Cir. 2006)	O		87	W	D	A	G	
U.S. v. Anziani, 2006 WL 2924936 (1st Cir. 2006)	D		121	W	D	A	G	
U.S. v. Santos-Martinez, 2006 WL 2709460 (1st Cir. 2006)	I		16	W	D	A	G	
U.S. v. Jones, 2006 WL 2673296 (1st Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Rodriguez,2006 WL2673310(1st Cir. 2006)	D		188	W	D	A	G	
U.S. v. Segalla, 2006 WL 2555913 (1st Cir. 2006)	F		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Quirindongo-Martinez, 2006 WL 2439968 (1st Cir. 2006)	O	27-33	33	W	D	A	G	
U.S. v. Peralta, 457 F.3d 169 (1st Cir. 2006)	D		135	W	D	A	G	
U.S. v. Burks, 2006 WL 2130106 (1st Cir. 2006)	D	120-?	120	W	D	A	G	
U.S. v. Morales-Rodriguez, 2006 WL 2034694 (1st Cir. 2006)	T		121	W	D	A	G	
U.S. v. Trinidad-Rodriguez, 2006 WL 3233767 (1st Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Vazquez-Mieses, 2006 WL 2742550 (1st Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Washington, 187 Fed. Appx. 3 (1st Cir. 2006)	D	168-210	168	W	D	A	G	
U.S. v. Feliz, 453 F.3d 33 (1st Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Wilson, 185 Fed. Appx. 6 (1st Cir. 2006)	D		320	W	D	A	G	
U.S. v. Brown, 450 F.3d 76 (1st Cir. 2006)	D	70-?	70	W	D	A	G	
U.S. v. Alvarez-Enciso, 181 Fed. Appx. 8 (1st Cir. 2006)	I	24-30	24	W	D	A	G	
U.S. v. Navedo-Concepcion, 450 F.3d 54 (1st Cir. 2006)	D	121-151	151	W	D	A	G	
U.S. v. Soto-Cruz, 449 F.3d 258 (1st Cir. 2006)	T	121-151	144	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Castro-Polanco, 182 Fed. Appx. 1 (1st Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Dixon, 449 F.3d 194 (1st Cir. 2006)	O	92-115	115	W	D	A	G	
U.S. v. Rivera, 448 F.3d 82 (1st Cir. 2006)	D, F	188-235	188	W	D	A	G	
U.S. v. Sagendorf, 445 F.3d 515 (1st Cir. 2006)	O	41-?	41	W	D	A	G	
U.S. v. Alli, 444 F.3d 34 (1st Cir. 2006)	T	18-24	21	W	D	A	G	
U.S. v. Saez, 444 F.3d 15 (1st Cir. 2006)	D	130-?	130	W	D	A	G	
U.S. v. Jiminez-Beltre, 440 F.3d 514 (1st Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Montero-Diaz, 173 Fed. Appx. 7 (1st Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Turbides-Leonardo, --F.3d--, 2006 WL 3290937 (1st Cir. 2006)	D		48	W	D	A	G	

SECOND CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pereira, 2006 WL 2925642 (2d Cir. 2006)	I	41-51	62	A	D	A	G	
U.S. v. Nurse, 2006 WL 2382919 (2d Cir. 2006)	T	7-13	24	A	D	A	G	
U.S. v. Singletary, 458 F.3d 72 (2d Cir. 2006)	D	27-33	42	A	D	A	G	
U.S. v. Fairclough, 439 F.3d 76 (2d Cir. 2006)	F	21-27	48	A	D	A	G	
U.S. v. Pettus, 2006 WL 328267 (2d Cir. 2006)	O	4-10	18	A	D	A	G	
U.S. v. Orlandez-Gamboa, 2006 WL 1668055 (2d Cir. 2006)	D	325-405	480	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Santiago, 2006 WL 3147353 (2d Cir. 2006)	S	70-87	63	B	D	A	G	
U.S. v. Giovanelli, 464 F.3d 346 (2d Cir. 2006)	O	121-151	90	B	D	A	G	
U.S. v. Mejia, 461 F.3d 158 (2d Cir. 2006)	I	46-57	37	B	D	A	G	
U.S. v. Ebbers, 458 F.3d 110 (2d Cir. 2006)	F	30 years to life	25 years	B	D	A	G	
U.S. v. Kane, 452 F.3d 140 (2d Cir. 2006)	T	30-37	24	B	D	A	G	
U.S. v. Florez, 447 F.3d 145 (2d Cir. 2006)	D	262-327	210	B	D	A	G	
U.S. v. McFarlane, 2006 WL 2521649 (2d Cir. 2006)	D		41	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Earls, 2006 WL 3310314 (2d Cir. 2006)	F		125	B	D	A	G	
U.S. v. Jones, 460 F.3d 191 (2d Cir. 2006)	D	30-37	15	B	G	A	D	
U.S. v. Castillo, 460 F.3d 337 (2d Cir. 2006)	D	135-168	87	B	G	R	G	S
U.S. v. Rattoballi, 452 F.3d 127 (2d Cir. 2006)	T	27-33	12	B	G	R	G	S
U.S. v. Maflahi, 2006 WL 2672085 (2d Cir. 2006)	O	210-262	60	Stat max	D	A	G	
U.S. v. Riley, 452 F.3d 160 (2d Cir. 2006)	F	188-235	120	Stat max	D	A	G	
U.S. v. Stinson, 2006 WL 2711988 (2d Cir. 2006)	F		51	W	D	A	G	
U.S. v. Morgan, 2006 WL 3026148 (2d Cir. 2006)	I		74	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 2006 WL 2711988 (2d Cir. 2006)	D	70-87	72	W	D	A	G	
U.S. v. Santos, 2006 WL 2564390 (2d Cir. 2006)	D		70	W	D	A	G	
U.S. v. Velasquez, 2006 WL 2990234 (2d Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Park, 461 F.3d 245 (2d Cir. 2006)	D		151	W	D	A	G	
U.S. v. Bliss, 2006 WL 1975433 (2d Cir. 2006)	D		40 years	W	D	A	G	
U.S. v. Ramirez, 454 F.3d 380 (2d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Ortega, 2006 WL 1843520 (2d Cir. 2006)	F		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Casteneda, 2006 WL 1737827 (2d Cir. 2006)	D			W	D	A	G	
U.S. v. Bello-Mosqueda, 2006 WL 1766703 (2d Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Delarosa, 2006 WL 1763878 (2d Cir.2006)	T		45	W	D	A	G	
U.S. v. Jimenez, 451 F.3d 97 (2d Cir. 2006)	D	57-71	60	W	D	A	G	
U.S. v. Macias, 2006 WL 1594003 (2d Cir. 2006)	D		108	W	D	A	G	
U.S. v. Elliot, 2006 WL 1582689 (2d Cir. 2006)	I		46	W	D	A	G	
U.S. v. Forquet, 2006 WL 1582690 (2d Cir. 2006)	D		151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Wu, 2006 WL 1423474 (2d Cir. 2006)	O		6	W	D	A	G	
U.S. v. Villanova, 2006 WL 1423432 (2d Cir. 2006)	I		77	W	D	A	G	
U.S. v. Tavera, 2006 WL 1426824 (2d Cir. 2006)	D		57	W	D	A	G	
U.S. v. Martinez, 2006 WL 1359946 (2d Cir. 2006)	D		135	W	D	A	G	
U.S. v. Caballero-Espinal, 2006 WL 1070941 (2d Cir. 2006)	I		46	W	D	A	G	
U.S. v. Matrulli, 2006 WL 1049108 (2d Cir. 2006)	T	33-41	33	W	D	A	G	
U.S. v. McDaniel, 2006 WL 917208 (2d Cir. 2006)	F		72	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Nicholas, 2006 WL 897860 (2d Cir. 2006)	T		117	W	D	A	G	
U.S. v. Fernandez, 443 F.3d 19 (2d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Tejada-Hilliano, 2006 WL 897767 (2d Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Victoria, 2006 WL 760136 (2d Cir. 2006)	D		165	W	D	A	G	
U.S. v. Folkes, 2006 WL 755955 (2d Cir. 2006)	D		55	W	D	A	G	
U.S. v. Beckett, 2006 WL 544487 (2d Cir. 2006)	F		70	W	D	A	G	
U.S. v. Smith, 2006 WL 522082 (2d Cir. 2006)	I		57	W	D	A	G	
U.S. v. Perez, 2006 WL 482557 (2d Cir. 2006)	D		292	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Harris, 2006 WL 374205 (2d Cir. 2006)	T		63	W	D	A	G	
U.S. v. Munroe, 2006 WL 354640 (2d Cir. 2006)	I	77-96	89	W	D	A	G	
U.S. v. Collins, 2006 WL 231666 (2d Cir. 2006)	D		151	W	D	A	G	
U.S. v. Claudillo-Marquez, 2006 WL 224182 (2d Cir. 2006)	I		77	W	D	A	G	
U.S. v. Emence, 2006 WL 189999 (2d Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Nash, 2006 WL 3147563 (2d Cir. 2006)	D		140	W	D	A	G	
U.S. v. Wilson, 2006 WL 3026162 (2d Cir. 2006)	D		200	W	D	A	G	
U.S. v. Khan, 2006 WL 268668 (2d. Cir. 2006)	I			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Marshall, 2006 WL 1788492 (2d Cir. 2006)	I		60	W	D	A	G	
U.S. v. Sow, 2006 WL 1318798 (2d Cir. 2006)	O	41-51	51	W	D	A	G	
U.S. v. Celaya-Romo, 2006 WL 1236329 (2d Cir. 2006)	D		168	W	D	A	G	
U.S. v. Castro, 2006 WL 958290 (2d Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Agnew, 2006 WL 707482 (2d Cir. 2006)	T		21	W	D	A	G	
U.S. v. Vargas, 2006 WL 700928 (2d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Rajotte, 2006 WL 616314 (2d Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Navarro, 2006 WL 3263834 (2d Cir. 2006)	T	57-71	57	W	D	A	G	
U.S. v. Dorney, 2006 WL 2919021 (2d Cir. 2006)	I		89	W	D	A	G	
U.S. v. Ellis, 2006 WL 2990202 (2d Cir. 2006)	I		46	W	D	A	G	
U.S. v. Wusebio, 2006 WL 2973010 (2d Cir. 2006)	I			W	D	A	G	
U.S. v. Watson, 2006 WL 266527 (2d Cir. 2006)	F, D		130	W	D	A	G	
U.S. v. Gamble, 2006 WL 3253087 (2d Cir. 2006)	D		216	W	D	A	G	
U.S. v. Fernandez, 2006 WL 3298426 (2d Cir. 2006)	I		46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ventura-Mejia, 2006 WL 3308205 (2d Cir. 2006)	I			W	D	A	G	
U.S. v. Drayton, 2006 WL 3307754 (2d Cir. 2006)	I	57-71	71	W	D	A	G	
U.S. v. Meija, 2006 WL 3326757 (2d Cir. 2006)	D		292	W	D	A	G	
U.S. v. Capozzi, 2006 WL 3307631 (2d Cir. 2006)	T		37	W	D	A	G	
U.S. v. Toohey, 448 F.3d 542 (2d Cir. 2006)	O	15-21	15	W	D	R	D	P

THIRD CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Brown, 2006 WL 3090333 (3d Cir. 2006)	T	70-87	90	A	D	A	G	
U.S. v. King, 2006 WL 2189683 (3d Cir. 2006)	S	27-33	40	A	D	A	G	
U.S. v. Powell, 2006 WL 2135049 (3d Cir. 2006)	T	41-51	56	A	D	A	G	
U.S. v. King, 454 F.3d 187 (3d Cir. 2006)	T	30-37	72	A	D	A	G	
U.S. v. Schweitzer, 454 F.3d 197 (3d Cir. 2006)	T	46-57	84	A	D	A	G	
U.S. v. Sparks, 184 Fed. Appx. 185 (3d Cir. 2006)	O	70-87	120	A	D	A	G	
U.S. v. Rose, 176 Fed. Appx. 295 (3d Cir. 2006)	O	4-10	24	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Burke, 176 Fed. Appx. 304 (3d Cir. 2006)	O	8-14	17	A	D	A	G	
U.S. v. Robinson, 174 Fed. Appx. 72 (3d Cir. 2006)	O	24-30	60	A	D	A	G	
U.S. v. Cropper, 168 Fed. Appx. 503 (3d Cir. 2006)	F	51-63	72	A	D	A	G	
Nabried v. U.S., 2006 WL 2474026 (3d Cir. 2006)	D	151-188	110	B	D	A	G	
U.S. v. Amos, 2006 WL 2384927 (3d Cir. 2006)	D	188-235	140	B	D	A	G	
U.S. v. Flores, 454 F.3d 149 (3d Cir. 2006)	T	70-87	32	B	D	A	G	
U.S. v. Gordon, 185 Fed. Appx. 192 (3d Cir. 2006)	D	262-327	210	B	D	A	G	
U.S. v. Brantley, 184 Fed. Appx. 258 (3d Cir. 2006)	T	151-188	144	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Baskerville, 181 Fed. Appx. 199 (3d Cir. 2006)	O	130-?	100	B	D	A	G	
U.S. v. Seaton, 178 Fed. Appx. 172 (3d Cir. 2006)	D	322-387	240	B	D	A	G	
U.S. v. Tyson, 176 Fed. Appx. 255 (3d Cir. 2006)	D	292-365	200	B	D	A	G	
U.S. v. Cepeda, 181 Fed. Appx. 177 (3d Cir. 2006)	D	57-71	45	B	D	A	G	
U.S. v. Walker, 172 Fed. Appx. 460 (3d Cir. 2006)	D		120	B	D	A	G	
U.S. v. Sargeant, 171 Fed. Appx. 954 (3d Cir. 2006)	F	210-262	120	B	D	A	G	
U.S. v. Giaguinto, 441 F.3d 195 (3d Cir. 2006)	D	30-?	27	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ricciotti, 170 Fed. Appx. 800 (3d Cir. 2006)	D	30-?	23	B	D	A	G	
U.S. v. Nunez, 173 Fed. Appx. 128 (3d Cir. 2006)	D	235-293	216	B	D	A	G	
U.S. v. Jackson, 169 Fed. Appx. 120 (3d Cir. 2006)	O	10-16	6	B	D	A	G	
U.S. v. Wilson, 2006 WL 3090125 (3d Cir. 2006)	T	84-105	72	B	D	A	G	
U.S. v. Millard, 184 Fed. Appx. 226 (3d Cir. 2006)	D	151-188	130	B	D	A	G	
U.S. v. Miles, 184 Fed. Appx. 222 (3d Cir. 2006)	D	100-120	87	B	D	A	G	
U.S. v. Hyung Pil Baek, 181 Fed. Appx. 165 (3d Cir. 2006)	T	70-87	24	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Benjamin, 2006 WL 3227881 (3d Cir. 2006)	T		39	W	D	A	G	
U.S. v. Hertzog, 186 Fed. Appx. 314 (3d Cir. 2006)	F		70	W	D	A	G	
U.S. v. Armstead, 185 Fed. Appx. 211 (3d Cir. 2006)	D		120	W	D	A	G	
U.S. v. Barron, 181 Fed. Appx. 269 (3d Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Skiba, 178 Fed. Appx. 159 (3d Cir. 2006)	O		240	W	D	A	G	
U.S. v. Thomas, 174 Fed. Appx. 1 (3d Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Jackson, 2006 WL 3247919 (3d Cir. 2006)	O	37-46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Charles, ---F.3d---, 2006 WL 3231396 (3d Cir. 2006)	O	37-46	46	W	D	A	G	
U.S. v. Cooley, 2006 WL 3227764 (3d Cir. 2006)	D	?-Life	Life	W	D	A	G	
U.S. v. Dees, ---F.3d---, 2006 WL 3209989 (3d Cir. 2006)	T	24-72	72	W	D	A	G	
U.S. v. Paz, 2006 WL 3201104 (3d Cir. 2006)	T			W	D	A	G	
U.S. v. Fowers, 2006 WL 3147204 (3d Cir. 2006)	S	78-97	85	W	D	A	G	
U.S. v. Gavin, 2006 WL 3079013 (3d Cir. 2006)	D	?-480	125	W	D	A	G	
U.S. v. Lyons, 2006 WL 3057558 (3d Cir. 2006)	D	70-87	70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tirado, 2006 WL 3024701 (3d Cir. 2006)	F	100-120	120	W	D	A	G	
U.S. v. Rodriguez-Sanchez, 2006 WL 2882078 (3d Cir. 2006)	D	?-Life	250	W	D	A	G	
U.S. v. Nesgoda, 2006 WL 2871273 (3d Cir. 2006)	O		120	W	D	A	G	
U.S. v. Neary, 2006 WL 2871275 (3d Cir. 2006)	T	151-188	170	W	D	A	G	
U.S. v. Henry, 2006 WL 2849651 (3d Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Samuelsen, 2006 WL 2826730 (3d Cir. 2006)	T	37-51	37	W	D	A	G	
U.S. v. Grasso, 2006 WL 2726500 (3d Cir. 2006)	T		107	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Outram, 2006 WL 2673288 (3d Cir. 2006)	I		57	W	D	A	G	
U.S. v. Parker, 462 F.3d 273 (3d Cir. 2006)	D	360-Life	349 (11 credit for time served)	W	D	A	G	
U.S. v. Hodge, 2006 WL 2400946 (3d Cir. 2006)	D	151-188	166	W	D	A	G	
U.S. v. Muhammad, 2006 WL 2189798 (3d Cir. 2006)	F	110-137	120	W	D	A	G	
U.S. v. Burtula, 2006 WL 2167586 (3d Cir. 2006)	T	37-46	37	W	D	A	G	
U.S. v. Purdie, 2006 WL 2092446 (3d Cir. 2006)	T	37-46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McIntyre, 186 Fed. Appx. 328 (3d Cir. 2006)	T	57-71	63	W	D	A	G	
U.S. v. Veneziale, 2006 WL 2076156 (3d Cir. 2006)	O	108-135	120	W	D	A	G	
U.S. v. Felix, 2006 WL 2051677 (3d Cir. 2006)	D		60	W	D	A	G	
U.S. v. Severino, 454 F.3d 206 (3d Cir. 2006)	D	63-78	63	W	D	A	G	
U.S. v. Mornan, 186 Fed. Appx. 192 (3d Cir. 2006)	T	97-121	120	W	D	A	G	
U.S. v. Sanders, 185 Fed. Appx. 176 (3d Cir. 2006)	T		183	W	D	A	G	
U.S. v. Taylor, 184 Fed. Appx. 146 (3d Cir. 2006)	D		335	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Newman, 186 Fed. Appx. 264 (3d Cir. 2006)		235-293	293	W	D	A	G	
U.S. v. Marshall, 186 Fed. Appx. 246 (3d Cir. 2006)	D	151-188	168	W	D	A	G	
U.S. v. Shusterman, 184 Fed. Appx. 224 (3d Cir. 2006)	T	51-63	51	W	D	A	G	
U.S. v. Jimenez-Calderon, 183 Fed. Appx. 274 (3d Cir. 2006)	S		210	W	D	A	G	
U.S. v. Long, 183 Fed. Appx. 182 (3d Cir. 2006)	T	18-24	18	W	D	A	G	
U.S. v. Briscoe-Bey, 182 Fed. Appx. 68 (3d Cir. 2006)	D	151-188	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bonilla Velasquez, 182 Fed. Appx. 120 (3d Cir. 2006)	I	77-96	85	W	D	A	G	
U.S. v. Clark, 182 Fed. Appx. 117 (3d Cir. 2006)	D	92-96	92	W	D	A	G	
U.S. v. Festus, 181 Fed. Appx. 147 (3d Cir. 2006)	O		105	W	D	A	G	
U.S. v. Kosek, 183 Fed. Appx. 174 (3d Cir. 2006)	F	70-87	86	W	D	A	G	
U.S. v. Eiswerth, 181 Fed. Appx. 175 (3d Cir. 2006)	D	46-57	46	W	D	A	G	
U.S. v. Efigenio, 183 Fed. Appx. 165 (3d Cir. 2006)	I	41-50	41	W	D	A	G	
U.S. v. Jarrett, 181 Fed. Appx. 233 (3d Cir. 2006)	F	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Able, 182 Fed. Appx. 77 (3d Cir. 2006)	I	18-24	18	W	D	A	G	
U.S. v. Thomas, 181 Fed. Appx. 188 (3d Cir. 2006)	D	46-57	46	W	D	A	G	
U.S. v. Braun, 180 Fed. Appx. 351 (3d Cir. 2006)	T	18-24	18	W	D	A	G	
U.S. v. Rene, 180 Fed. Appx. 339 (3d Cir. 2006)	F	51-63	57	W	D	A	G	
U.S. v. Carroll, 179 Fed. Appx. 128 (3d Cir. 2006)	S _	140-175	175	W	D	A	G	
U.S. v. Stewart, 179 Fed. Appx. 814 (3d Cir. 2006)	D	360-Life	Life	W	D	A	G	
U.S. v. Kossak, 178 Fed. Appx. 183 (3d Cir. 2006)	T	57-71	60	W	D	A	G	
U.S. v. Pena, 177 Fed. Appx. 257 (3d Cir. 2006)	D	57-71	60	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Scott, 178 Fed. Appx. 140 (3d Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Gray, 176 Fed. Appx. 315 (3d Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Rackley, 175 Fed. Appx. 564 (3d Cir. 2006)	O	78-97	90	W	D	A	G	
U.S. v. McNeal, 175 Fed. Appx. 546 (3d Cir. 2006)	F	18-24	18	W	D	A	G	
U.S. v. Reed, 173 Fed. Appx. 184 (3d Cir. 2006)	F	63-78	78	W	D	A	G	
U.S. v. Gomez-Fonseca, 171 Fed. Appx. 957 (3d Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Boyd, 173 Fed. Appx. 139 (3d Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Veshio, 174 Fed. Appx. 63 (3d Cir. 2006)	T	151-188	170	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dair, 174 Fed. Appx. 68 (3d Cir. 2006)	D	324-405	325	W	D	A	G	
U.S. v. Weaver, 175 Fed. Appx. 506 (3d Cir. 2006)	O	30-37	36	W	D	A	G	
U.S. v. Reyes, 169 Fed. Appx. 115 (3d Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Knighton, 171 Fed. Appx. 939 (3d Cir. 2006)	T	70-87	70	W	D	A	G	
U.S. v. Cooper, 437 F.3d 324 (3d Cir. 2006)	D	84-105	105	W	D	A	G	
U.S. v. Riddle, 174 Fed. Appx. 662 (3d Cir. 2006)	D	41-51	42	W	D	A	G	
U.S. v. Gunter, 462 F.3d 237 (3d Cir. 2006)	D	295-353	295	W	D	R	D	P
U.S. v. Webb, 2006 WL 2974124 (3d Cir. 2006)	F			W	D	A	G	

FOURTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Carpenter, 2006 WL 2986548 (4th Cir. 2006)	F	15-21	30	A	D	A	G	
U.S. v. Robinson, 2006 WL 2794398 (4th Cir. 2006)	O	8-14	24	A	D	A	G	
U.S. v. Smiley, 2006 WL 2347625 (4th Cir. 2006)	T	84-105	120	A	D	A	G	
U.S. v. Smith, 2006 WL 2347524 (4th Cir. 2006)	D		60	A	D	A	G	
U.S. v. Crudup, 461 F.3d 433 (4th Cir. 2006)	O	5-11	36	A	D	A	G	
U.S. v. Spain, 2006 WL 1627248 (4th Cir. 2006)	O		61	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hall, 2006 WL 1307881 (4th Cir. 2006)	T	4-10	20	A	D	A	G	
U.S. v. Betanzos-Flores, 2006 WL 392068 (4th Cir. 2006)	I	21-27	30	A	D	A	G	
U.S. v. Ferguson, 2006 WL 786817 (4th Cir. 2006)	D		765	A	D	A	G	
U.S. v. Davenport, 445 F.3d 366 (4th Cir. 2006)	T	30-37	120	A	D	R	D	S
U.S. v. Canady, 2006 WL 2686625 (4th Cir. 2006)	D		315	B	D	A	G	
U.S. v. Canady, 2006 WL 2688869 (4th Cir. 2006)	D		248	B	D	A	G	
U.S. v. Canady, 2006 WL 2620153 (4th Cir. 2006)	D, F		200	B	D	A	G	
U.S. v. Marcum, 2006 WL 2591917 (4th Cir. 2006)	T	63-78	60	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Basurto, 2006 WL 2520317 (4th Cir. 2006)	D		180	B	D	A	G	
U.S. v. Bonnie, 2006 WL 2492161 (4th Cir. 2006)	D			B	D	A	G	
U.S. v. McLean, 2006 WL 2140033 (4th Cir. 2006) (defendant D. Zimmerman)	T	135-?	120	B	D	A	G	
U.S. v. Davis, 2006 WL 2076447 (4th Cir. 2006)	D	210-262	188	B	D	A	G	
U.S. v. Guffey, 2006 WL 1828012 (4th Cir. 2006)	S	121-151	96	B	D	A	G	
U.S. v. Katz, 2006 WL 1636740 (4th Cir. 2006)	T	97-121	72	B	D	A	G	
U.S. v. Wishon, 2006 WL 1443698 (4th Cir. 2006)	F	121-150	100	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thompson, 2006 WL 1233245 (4th Cir. 2006)	T	24-30	15	B	D	A	G	
U.S. v. Woods, 2006 WL 538030 (4th Cir. 2006)	O		320	B	D	A	G	
U.S. v. Santos, 2006 WL 476620 (4th Cir. 2006)	F		168	B	D	A	G	
U.S. v. Hampton, 441 F.3d 284 (4th Cir. 2006)	F	57-71	36	B	G	R	G	S
U.S. v. Curry, 461 F.3d 452 (4th Cir. 2006)	T	41-51	12	B	G	R	G	S
U.S. v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006)	I	37-46	24	B	G	R	G	S
U.S. v. Kimbrough, 2006 WL 1233525 (4th Cir. 2006)	D	168-210	120	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Eura, 440 F.3d 625 (4th Cir. 2006)	D	78-97	60	B	G	R	G	S
U.S. v. Clark, 434 F.3d 684 (4th Cir. 2006)	D	46-57	8	B	G	R	G	S
U.S. v. Williams, 2006 WL 3026266 (4th Cir. 2006)	D	97-121	6	B	G	R	D	S
U.S. v. Khan, 461 F.3d 477 (4th Cir. 2006)	O	97-121	52	B	G	R	G	S
U.S. v. Moreland, 437 F.3d 424 (4th Cir. 2006)	D	360-life	120	B	G	R	G	S
U.S. v. Shore, 2006 WL 241368 (4th Cir. 2006)	F	130-162	120	stat max	D	A	G	
U.S. v. McLean, 2006 WL 2140033 (4th Cir. 2006) (defendant P. Zimmerman)	T	168-?	132	stat max	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 444 F.3d 250 (4th Cir. 2006)	T	77-96	60	stat max	D	A	G	
U.S. v. Deberry, 2006 WL 871281 (4th Cir. 2006)	F		120	stat max	D	A	G	
U.S. v. Dowtin, 2006 WL 655079 (4th Cir. 2006)	F		44	W	D	A	G	
U.S. v. Esposito, 2006 WL 3327804 (4th Cir. 2006)	T			W	D	A	G	
U.S. v. Owens, 2006 WL 3327588 (4th Cir. 2006)	D	262-327	300	W	D	A	G	
U.S. v. Dumas, 2006 WL 3311504 (4th Cir. 2006)	O		15	W	D	A	G	
U.S. v. Perez-Mendez, 2006 WL 3313359 (4th Cir. 2006)	D		168	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Davis, 2006 WL 3267349 (4th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Stanback, 2006 WL 3253931 (4th Cir. 2006)	D		420	W	D	A	G	
U.S. v. Phillips, 2006 WL 3207969 (4th Cir. 2006)	F		24	W	D	A	G	
U.S. v. Phelps, 2006 WL 3147514 (4th Cir. 2006)	D, F	262-327	262	W	D	A	G	
U.S. v. Lutz, 2006 WL 3077440 (4th Cir. 2006)	S		65	W	D	A	G	
U.S. v. Wimbush, 2006 WL 3055494 (4th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Hill, 2006 WL 3069471 (4th Cir. 2006)	D		188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Shields, 2006 WL 3026305 (4th Cir. 2006)	F	110-120	120	W	D	A	G	
U.S. v. Brown, 2006 WL 3025749 (4th Cir. 2006)	O, F		300	W	D	A	G	
U.S. v. Minter, 2006 WL 3018109 (4th Cir. 2006)	D		41	W	D	A	G	
U.S. v. Brown, 2006 WL 3018104 (4th Cir. 2006)	F			W	D	A	G	
U.S. v. Barajas, 2006 WL 2974323 (4th Cir. 2006)	D		84	W	D	A	G	
U.S. v. Rutland, 2006 WL 2974333 (4th Cir. 2006)	D	235-298	235	W	D	A	G	
U.S. v. Naranjo, 2006 WL 2953366 (4th Cir. 2006)	I	57-71	62	W	D	A	G	
U.S. v. Plaismond, 2006 WL 2953400 (4th Cir. 2006)	D	168-210	168	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Anthony, 2006 WL 2930145 (4th Cir. 2006)	D		324	W	D	A	G	
U.S. v. Anthony, 2006 WL 2930145 (4th Cir. 2006) (defendant Scott)	D		360	W	D	A	G	
U.S. v. Carter, 2006 WL 2930143 (4th Cir. 2006)	F		78	W	D	A	G	
U.S. v. Lee, 2006 WL 2853975 (4th Cir. 2006)	F	57-71	71	W	D	A	G	
U.S. v. Kafka-Banderas, 2006 WL 2846458 (4th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Plumber, 2006 WL 2846453 (4th Cir. 2006)	T	27-33	31	W	D	A	G	
U.S. v. Haynes, 2006 WL 2817656 (4th Cir. 2006)	D	188-235	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Malloy, 2006 WL 2817657 (4th Cir. 2006)	F		188	W	D	A	G	
U.S. v. Luck, 2006 WL 2711929 (4th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Johnson, 2006 WL 2711976 (4th Cir. 2006)	F		161	W	D	A	G	
U.S. v. Dominguez-Villegas, 2006 WL 2668682 (4th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Garcia-Arzate, 2006 WL 2640242 (4th Cir. 2006)	D		156	W	D	A	G	
U.S. v. Stroupe, 2006 WL 2620209 (4th Cir. 2006)	T		57	W	D	A	G	
U.S. v. Patterson, 2006 WL 2620174 (4th Cir. 2006)	D		262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Andaya-Penalosa, 2006 WL 2562322 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Connor, 2006 WL 2547960 (4th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Little, 2006 WL 2527670 (4th Cir. 2006)	F		72	W	D	A	G	
U.S. v. Moss, 2006 WL 2520299 (4th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Sanders, 2006 WL 2520308 (4th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Myrick, 2006 WL 2465326 (4th Cir. 2006)	D	100-125	100	W	D	A	G	
U.S. v. Plata-Oceguera, 2006 WL 2460860 (4th Cir. 2006)	I		54	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Frost, 2006 WL 2433961 (4th Cir. 2006)	D, F	235-293	235	W	D	A	G	
U.S. v. Vasquez, 2006 WL 2460750 (4th Cir. 2006)	D	292-365	292	W	D	A	G	
U.S. v. Whitlock, 2006 WL 2433985 (4th Cir. 2006)	O	7-13	13	W	D	A	G	
U.S. v. Epperson, 2006 WL 2457154 (4th Cir. 2006)	F		33	W	D	A	G	
U.S. v. Pankey, 2006 WL 2457166 (4th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Craig, 2006 WL 2347648 (4th Cir. 2006)	D	84-105	84	W	D	A	G	
U.S. v. Williams, 2006 WL 2347518 (4th Cir. 2006)	D	78-97	97	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Scott, 2006 WL 2335547 (4th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Baker, 2006 WL 2277730 (4th Cir. 2006)	F	110-120	110	W	D	A	G	
U.S. v. Battles, 2006 WL 2141222 (4th Cir. 2006)	T	97-121	97	W	D	A	G	
U.S. v. McLean, 2006 WL 2140033 (4th Cir. 2006)	T	235-293	252	W	D	A	G	
U.S. v. Gibbs, 2006 WL 2142076 (4th Cir. 2006)	T			W	D	A	G	
U.S. v. Fuller, 2006 WL 2092537 (4th Cir. 2006)	T, F		84/60	W	D	A	G	
U.S. v. Noe, 2006 WL 2076444 (4th Cir. 2006)	T	78-97	78	W	D	A	G	
U.S. v. Roussos, 2006 WL 2076453 (4th Cir. 2006)	D		360	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Oglesby, 2006 WL 2076453 (4th Cir. 2006)	D		235	W	D	A	G	
U.S. v. McDonald, 2006 WL 2076451 (4th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Hayward, 2006 WL 2052073 (4th Cir. 2006)	F		38	W	D	A	G	
U.S. v. King, 2006 WL 2044878 (4th Cir. 2006)	T	41-51	41	W	D	A	G	
U.S. v. Billingsley, 2006 WL 2044850 (4th Cir. 2006)	D		324	W	D	A	G	
U.S. v. Price, 2006 WL 2044850 (4th Cir. 2006)	D		262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Overstreet, 2006 WL 2010850 (4th Cir. 2006)	F		63	W	D	A	G	
U.S. v. Shipman, 2006 WL 2010843 (4th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Dublin, 2006 WL 1956414 (4th Cir. 2006)	D	life	life	W	D	A	G	
U.S. v. Brooks, 2006 WL 1971628 (4th Cir. 2006)	F		87	W	D	A	G	
U.S. v. Louis, 2006 WL 1971622 (4th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Hailey, 2006 WL 1920017 (4th Cir. 2006)	F	180-210	190	W	D	A	G	
U.S. v. Statts, 2006 WL 1918956 (4th Cir. 2006)	D, F	84-105	84	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Daniels, 2006 WL 1888823 (4th Cir. 2006)	D, T		360	W	D	A	G	
U.S. v. Dailey, 2006 WL 1888880 (4th Cir. 2006)	D, F		78	W	D	A	G	
U.S. v. Discua, 2006 WL 1888828 (4th Cir. 2006)	T	135-168	151	W	D	A	G	
U.S. v. Shull, 2006 WL 1880194 (4th Cir. 2006)	T	15-21	21	W	D	A	G	
U.S. v. Sehen, 2006 WL 1867372 (4th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Marrs, 2006 WL 1868493 (4th Cir. 2006)	D		41	W	D	A	G	
U.S. v. Gordy, 2006 WL 1877212 (4th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Goodline, 2006 WL 1877214 (4th Cir. 2006)	F	77-96	92	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 2006 WL 1817100 (4th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Washington, 2006 WL 1819026 (4th Cir. 2006)	F	100-125	100	W	D	A	G	
U.S. v. Ollivierre, 2006 WL 1792739 (4th Cir. 2006)	D	210-262	210	W	D	A	G	
U.S. v. Thomas, 2006 WL 1835942 (4th Cir. 2006)	D	262-327	270	W	D	A	G	
U.S. v. Young, 2006 WL 1835971 (4th Cir. 2006)	O	7-13	10	W	D	A	G	
U.S. v. Adolphus, 2006 WL 1835948 (4th Cir. 2006)	F	92-115	115	W	D	A	G	
U.S. v. Esparza, 2006 WL 1835964 (4th Cir. 2006)	I	77-96	77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Perry, 2006 WL 1835955 (4th Cir. 2006)	O		19	W	D	A	G	
U.S. v. Brown, 2006 WL 1766743 (4th Cir. 2006)	T	78-97	78	W	D	A	G	
U.S. v. Staine, 2006 WL 1766122 (4th Cir. 2006) (defendant Joseph)	D		262	W	D	A	G	
U.S. v. Benavides, 2006 WL 1766121 (4th Cir. 2006)	I	33-41	33	W	D	A	G	
U.S. v. Florence, 2006 WL 1722492 (4th Cir. 2006)	D		268	W	D	A	G	
U.S. v. Hodge, 2006 WL 1722496 (4th Cir. 2006)	F		27	W	D	A	G	
U.S. v. Adams, 2006 WL 1667454 (4th Cir. 2006)	F	92-115	115	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bustos-Serrano, 2006 WL 1676313 (4th Cir. 2006)	D	168-210	175	W	D	A	G	
U.S. v. Nichols, 2006 WL 1676334 (4th Cir. 2006)	D, F	188-235	190	W	D	A	G	
U.S. v. Briggs, 2006 WL 1642643 (4th Cir. 2006)	O		8	W	D	A	G	
U.S. v. De La Rosa, 2006 WL 1642630 (4th Cir. 2006)	I	46-57	52	W	D	A	G	
U.S. v. Lowe, 2006 WL 1642639 (4th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Barrett, 2006 WL 1627266 (4th Cir. 2006)	F	41-51	41	W	D	A	G	
U.S. v. Timmons, 2006 WL 1627234 (4th Cir. 2006)	D, F		235, 120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Manns, 2006 WL 1627271 (4th Cir. 2006)	F		63	W	D	A	G	
U.S. v. Christian, 2006 WL 1582706 (4th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Hammonds, 2006 WL 1582710 (4th Cir. 2006)	T		300	W	D	A	G	
U.S. v. Graves, 2006 WL 1541150 (4th Cir. 2006)	O	37-46	37	W	D	A	G	
U.S. v. Garcia-Uribe, 2006 WL 1476923 (4th Cir. 2006)	D	135-168	160	W	D	A	G	
U.S. v. Moore, 2006 WL 1476890 (4th Cir. 2006)	T		216	W	D	A	G	
U.S. v. Eaves, 2006 WL 1476922 (4th Cir. 2006)	T		165	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Owens, 2006 WL 1476915 (4th Cir. 2006)	F		100	W	D	A	G	
U.S. v. Caldwell, 2006 WL 1476185 (4th Cir. 2006)	F		78	W	D	A	G	
U.S. v. Billings, 2006 WL 1476872 (4th Cir. 2006)	D	360-480	360	W	D	A	G	
U.S. v. Lepe-Rodriguez, 2006 WL 1476188 (4th Cir. 2006)	I		63	W	D	A	G	
U.S. v. Fowler, 2006 WL 1476180 (4th Cir. 2006)	F		27	W	D	A	G	
U.S. v. Harmer, 2006 WL 1444592 (4th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Dowell, 2006 WL 1408323 (4th Cir. 2006)	D	188-235	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 2006 WL 1373183 (4th Cir. 2006)	F	37-46	37	W	D	A	G	
U.S. v. Bryant, 2006 WL 1328692 (4th Cir. 2006)	D,F		420	W	D	A	G	
U.S. v. Shatley, 448 F.3d 264 (4th Cir. 2006)	O		33	W	D	A	G	
U.S. v. Miles, 2006 WL 1328690 (4th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Harbin, 2006 WL 1308637 (4th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Kirk, 2006 WL 1308640 (4th Cir. 2006)	D		51	W	D	A	G	
U.S. v. Espinoza-Barreto, 2006 WL 1233935 (4th Cir. 2006)	I		68	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Oglesbee, 2006 WL 1144512 (4th Cir. 2006)	O		life	W	D	A	G	
U.S. v. Sanchez, 2006 WL 1144514 (4th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Wallace, 2006 WL 1144497 (4th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Navarette-Beltran, 2006 WL 1144495 (4th Cir. 2006)	I	57-71	71	W	D	A	G	
U.S. v. Wilfoung, 2006 WL 1144515 (4th Cir. 2006)	D	210-262	210	W	D	A	G	
U.S. v. Rita, 2006 WL 1144508 (4th Cir. 2006)	O		33	W	D	A	G	
U.S. v. Tyler, 2006 WL 1144520 (4th Cir. 2006)	F	24-30	27	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera-Magana, 2006 WL 1144511 (4th Cir. 2006)	I	27-33	27	W	D	A	G	
U.S. v. Bowman, 2006 WL 1130901 (4th Cir. 2006)	F		63	W	D	A	G	
U.S. v. Leggett, 2006 WL 1130904 (4th Cir. 2006)	D		165	W	D	A	G	
U.S. v. Allen, 2006 WL 1114117 (4th Cir. 2006)	F		108	W	D	A	G	
U.S. v. Canady, 2006 WL 1112824 (4th Cir. 2006)	D		136	W	D	A	G	
U.S. v. Myers, 2006 WL 1068980 (4th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Allen, 2006 WL 1068979 (4th Cir. 2006)	F	92-115	110	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Belser, 2006 WL 1005011 (4th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Burress, 2006 WL 1005015 (4th Cir. 2006)	F		210	W	D	A	G	
U.S. v. Daniels, 2006 WL 1005013 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Parker, 2006 WL 994442 (4th Cir. 2006)	D, F	308-355	324	W	D	A	G	
U.S. v. Coaxum, 2006 WL 980796 (4th Cir. 2006)	S		12	W	D	A	G	
U.S. v. Johnson, 445 F.3d 339 (4th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Divine, 2006 WL 908743 (4th Cir. 2006)	F		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
(4th Cir. 2006)(Apr. 6, 2006 4th Cir.)	D		180	W	D	A	G	
U.S. v. Fitch, 2006 WL 889580 (4th Cir. 2006)	D		75	W	D	A	G	
U.S. v. Juarez-Huarte, 2006 WL 889470 (4th Cir. 2006)	I	27-33	27	W	D	A	G	
U.S. v. Battle, 2006 WL 889794 (4th Cir. 2006)	O	120-150	150	W	D	A	G	
U.S. v. Mason, 2006 WL 889573 (4th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Patton, 2006 WL 871290 (4th Cir. 2006)	T	30-37	37	W	D	A	G	
U.S. v. Monahan, 2006 WL 870590 (4th Cir. 2006)	F	30-37	30	W	D	A	G	
U.S. v. Moore, 2006 WL 871065 (4th Cir. 2006)	F		37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dove, 2006 WL 870582 (4th Cir. 2006)	D		84	W	D	A	G	
U.S. v. Green, 2006 WL 786816 (4th Cir. 2006)	T		70	W	D	A	G	
U.S. v. Southern, 2006 WL 786812 (4th Cir. 2006)	O		320	W	D	A	G	
U.S. v. Robinson, 2006 WL 775088 (4th Cir. 2006)	O		4	W	D	A	G	
U.S. v. Robinson, 2006 WL 775088 (4th Cir. 2006)	T		18	W	D	A	G	
U.S. v. Gutierrez-Piza, 2006 WL 751521 (4th Cir. 2006)	I	30-37	37	W	D	A	G	
U.S. v. Rivera-Cruz, 2006 WL 694371 (4th Cir. 2006)	T		12	W	D	A	G	
U.S. v. Wallace, 2006 WL 690967 (4th Cir. 2006)	F		180	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rodriguez-Pineda, 2006 WL 678953 (4th Cir. 2006)	I		71	W	D	A	G	
U.S. v. Lewis, 2006 WL 678932 (4th Cir. 2006)	O	120-150	150	W	D	A	G	
U.S. v. Keitt, 2006 WL 678946 (4th Cir. 2006)	O		41	W	D	A	G	
U.S. v. McNair, 2006 WL 678936 (4th Cir. 2006)	F	37-46	37	W	D	A	G	
U.S. v. Gause, 2006 WL 615903 (4th Cir. 2006)	D			W	D	A	G	
U.S. v. Bruton, 2006 WL 558990 (4th Cir. 2006)	D, F			W	D	A	G	
U.S. v. Caldwell, 2006 WL 538097 (4th Cir. 2006)	O	18-24	24	W	D	A	G	
U.S. v. Smoot, 2006 WL 525496 (4th Cir. 2006)	D	121-151	136	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Blythe, 2006 WL 487811 (4th Cir. 2006)	O		8	W	D	A	G	
U.S. v. Williams, 2006 WL 487156 (4th Cir. 2006)	F		48	W	D	A	G	
U.S. v. Krizanovic, 2006 WL 485515 (4th Cir. 2006)	O		46	W	D	A	G	
U.S. v. Shultz, 2006 WL 435837 (4th Cir. 2006)	O		46	W	D	A	G	
U.S. v. Good, 2006 WL 448906 (4th Cir. 2006)	F	235-293	252	W	D	A	G	
U.S. v. Bennett, 2006 WL 372636 (4th Cir. 2006)	F		30	W	D	A	G	
U.S. v. O'Briant, 2006 WL 372638 (4th Cir. 2006)	T		27	W	D	A	G	
U.S. v. Brown, 2006 WL 372639 (4th Cir. 2006)	F		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Gaynor, 2006 WL 372622 (4th Cir. 2006)	D	84-100	95	W	D	A	G	
U.S. v. Haskins, 2006 WL 314465 (4th Cir. 2006)	D, F		240	W	D	A	G	
U.S. v. France, 2006 WL 285614 (4th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Camara, 2006 WL 237092 (4th Cir. 2006)	T	10-16	10	W	D	A	G	
U.S. v. McDaniels, 2006 WL 2288717 (4th Cir. 2006)	F		46	W	D	A	G	
U.S. v. Blanks, 2006 WL 199479 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Haston, 2006 WL 177565 (4th Cir. 2006)	D		37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Martinez-Flores, 2006 WL 189953 (4th Cir. 2006)	F		24	W	D	A	G	
U.S. v. Guzman-Balbuena, 2006 WL 172284 (4th Cir. 2006)	I		70	W	D	A	G	
U.S. v. McClelland, 2006 WL 172250 (4th Cir. 2006)	D		57	W	D	A	G	
U.S. v. Cox, 2006 WL 172289 (4th Cir. 2006)	F	37-46	40	W	D	A	G	
U.S. v. Cunningham, 2006 WL 149066 (4th Cir. 2006)	O		185	W	D	A	G	
U.S. v. Phillips, 2006 WL 26117 (4th Cir. 2006) (defendant Ziegler)	D			W	D	A	G	
U.S. v. Fox, 2006 WL 15381 (4th Cir. 2006)	D		41	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dawkins, 2006 WL 10895 (4th Cir. 2006)	F		64	W	D	A	G	
U.S. v. Barrett, 2006 WL 2992902 (4th Cir. 2006)	F		120	W	D	A	G	
U.S. v. Dennis, 2006 WL 2918748 (4th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Faulks, 2006 WL 2683300 (4th Cir. 2006)	O		36	W	D	A	G	
U.S. v. Dinnall, 2006 WL 1766122 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Staine, 2006 WL 1766122 (4th Cir. 2006)	D		life	W	D	A	G	
U.S. v. Hardnett, 2006 WL 1446284 (4th Cir. 2006)	D		392	W	D	A	G	
U.S. v. Johnson, 2006 WL 487329 (4th Cir. 2006)	O		30	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dewalt, 2006 WL 149087 (4th Cir. 2006)	O		16	W	D	A	G	
U.S. v. Roy, 2006 WL 1307867 (4th Cir. 2006)	O		60	W	D	A	G	

FIFTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Corley, 2006 WL 3019195 (5th Cir. 2006)	F			A	D	A	G	
U.S. v. Roach, 2006 WL 2861802 (5th Cir. 2006)	F	37-46	60	A	D	A	G	
U.S. v. Angleton, 2006 WL 2828657 (5th Cir. 2006)	T		60	A	D	A	G	
U.S. v. Day, 2006 WL 2692575 (5th Cir. 2006)	T		120	A	D	A	G	
U.S. v. Weese, 2006 WL 2590309 (5th Cir. 2006)	O		24	A	D	A	G	
U.S. v. Shankin, 2006 WL 2337947 (5th Cir. 2006)	T	15-21	60	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hoyos, 181 Fed.Appx. 479 (5th Cir. 2006)	D		28	A	D	A	G	
U.S. v. Miranda-Echartea, 188 Fed.Appx. 298 (5th Cir. 2006)	D		70	A	D	A	G	
U.S. v. Rios-Joaquina, 188 Fed.Appx. 286 (5th Cir. 2006)	I		60	A	D	A	G	
U.S. v. Collins, 188 Fed.Appx. 266 (5th Cir. 2006)	F	51-63	72	A	D	A	G	
U.S. v. Clements, 188 Fed.Appx. 267 (5th Cir. 2006)	T	57-71	84	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Salinas, 187 Fed.Appx. 396 (5th Cir. 2006)	D	135-168	240	A	D	A	G	
U.S. v. Jones, 182 Fed.Appx. 343 (5th Cir. 2006)	O		24	A	D	A	G	
U.S. v. Howard, 179 Fed.Appx. 233 (5th Cir. 2006)	F	approx. 40	84	A	D	A	G	
U.S. v. Gentry, 178 Fed.Appx. 435 (5th Cir. 2006)	T	151-188	240	A	D	A	G	
U.S. v. Taylor, 179 Fed.Appx. 226 (5th Cir. 2006)	F	77-96	120	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 176 Fed.Appx. 625 (5th Cir. 2006)	T	63-78	96	A	D	A	G	
U.S. v. Negron Cabrera, 174 Fed.Appx. 856 (5th Cir. 2006)	O		114	A	D	A	G	
U.S. v. Jones, 444 F.3d 430 (5th Cir. 2006)	S	46-57	120	A	D	A	G	
U.S. v. Reinhart, 442 F.3d 857 (5th Cir. 2006)	S	121-151	235	A	D	A	G	
U.S. v. Smith, 440 F.3d 704 (5th Cir. 2006)	F	21-27	60	A	D	A	G	
U.S. v. Perez-Guzman, 2006 WL 3102582, 2006 WL 3102582 (5th Cir. 2006)	I		49	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Guzman-Guzman, 2006 WL 3040637 (5th Cir. 2006)	I		69	A	D	A	G	
U.S. v. Verastegui, 2006 WL 2852399 (5th Cir. 2006)	F, I	63-78	120	A	D	A	G	
U.S. v. Satti, 179 Fed.Appx. 235 (5th Cir. 2006)	F, I			A	D	A	G	
U.S. v. Sterling, 180 Fed.Appx. 515 (5th Cir. 2006)	F		120	A	D	A	G	
U.S. v. Dean, 2006 WL 3005546 (5th Cir. 2006)	D		120	A	D	A	G	
U.S. v. Delancey, 2006 WL 1996385 (5th Cir. 2006)	F		life	A	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tzep-Majia, 461 F.3d 522 (5th Cir. 2006)	I	46-57	36	B	D	A	D	
Unted States v. Johnson, 2006 WL 2277619 (5th Cir. 2006)	D	151-188	144	B	D	A	G	
U.S. v. Brasher, 2006 WL 2167703 (5th Cir. 2006)	D	57-71	48	B	D	A	G	
U.S. v. McCuiston, 183 Fed.Appx. 474 (5th Cir. 2006)	D			B	D	A	G	
U.S. v. Daniel, 178 Fed.Appx. 345 (5th Cir. 2006)	D	240 statuto ry max	120	B	D	A	G	
U.S. v. Bell, 2006 WL 572318 (5th Cir. 2006)	D		120	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rodriguez-Ibarra, 180 Fed.Appx. 513 (5th Cir. 2006)	I	41-51	36	B	D	A	G	
U.S. v. Martinez, 178 Fed.Appx. 404 (5th Cir. 2006)	D	78-98	68	B	D	A	G	
U.S. v. Roush, 466 F.3d 380 (5th Cir. 2006)	T	37-46	27	B	D	R	G	S
U.S. v. Goldsmith, 2006 WL 2034468 (5th Cir. 2006)	F	27-33	0.1	B	G	R	G	S
U.S. v. Armendariz, 451 F.3d 352 (5th Cir. 2006)	S	60-71 plus 3 years supervised release	60 plus no supervised release	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Duhon, 440 F.3d 711 (5th Cir. 2006)	S	15-21	probatio n	B	G	R	G	S
U.S. v. Guidry, 462 F.3d 373 (5th Cir. 2006)	D	235-293	120	B	G	R	G	S
U.S. v. Johnson, 445 F.3d 793 (5th Cir. 2006)	F	135-168	120	stat max	D	A	G	
U.S. v. Ellis, 2006 WL 3102574 (5th Cir. 2006)	F		96	W	D	A	G	
U.S. v. Watkins, 2006 WL 3311067 (5th Cir. 2006)	D		155	W	D	A	G	
U.S. v. Petisca, 2006 WL 3230274 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. Horsting, 2006 WL 3193368 (5th Cir. 2006)	O	100-125	100	W	D	A	G	
U.S. v. Clark, 2006 WL 3102513 (5th Cir. 2006)	S		51	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Smith, 2006 WL 3068667 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Washington, 2006 WL 2882703 (5th Cir. 2006)	D, F		262	W	D	A	G	
U.S. v. Wishork, WL 2711968 (5th Cir. 2006)	S		180	W	D	A	G	
U.S. v. Ibarra-Zelaya, 465 F.3d 5960 (5th Cir. 2006)	O			W	D	A	G	
U.S. v. Vanchaik-Molinar, 2006 WL 2474048 (5th Cir. 2006)	I		51	W	D	A	G	
U.S. v. Ray, 2006 WL 2482878 (5th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Clark, 2006 WL 2418953 (5th Cir. 2006)	F		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Underwood, 2006 WL 2460894 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Aguirre-Villa, 460 F.3d 681 (5th Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Jones, 2006 WL 2350166 (5th Cir. 2006)	F		78	W	D	A	G	
U.S. v. Larry, 2006 WL 2337543 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. El-Kareh, 2006 WL 2311112 (5th Cir. 2006)	T		48	W	D	A	G	
U.S. v. Llanas-Garcia, 2006 WL 209118 (5th Cir. 2006)	O		51	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Santoyo-Garcia, 2006 WL 2061833 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Robinson, 2006 WL 1983201 (5th Cir. 2006)	F		262	W	D	A	G	
U.S. v. Poore, 188 Fed.Appx. 245 (5th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Bell, 187 Fed.Appx. 418 (5th Cir. 2006)	D		240	W	D	A	G	
U.S. v. Candia, 454 F.3d 468 (5th Cir. 2006)	D	235-293	280	W	D	A	G	
U.S. v. Medina-Argueta, 454 F.3d 479 (5th Cir. 2006)	I	30-37	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ulloa, 187 Fed.Appx. 367 (5th Cir. 2006)	D		125	W	D	A	G	
U.S. v. Lopez-Garces, 186 Fed.Appx. 454 (5th Cir. 2006)	I		50	W	D	A	G	
U.S. v. Corona-Majatca, 186 Fed.Appx. 436 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Salazar, 183 Fed.Appx. 462 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Kirkham, 182 Fed.Appx. 378 (5th Cir. 2006)	T		120, 87 (two defendants)	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Luevano-Orozco, 182 Fed.Appx. 376 (5th Cir. 2006)	I		120	W	D	A	G	
U.S. v. Brown, 180 Fed.Appx. 545 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Aburto, 179 Fed.Appx. 915 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. Garcia, 173 Fed.Appx. 358 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Palacios-Mungia, 178 Fed.Appx. 347 (5th Cir. 2006)	I	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Caldwell, 448 F.3d 287 (5th Cir. 2006)	F	24-30	24	W	D	A	G	
U.S. v. Guzman-Resendez, 2006 WL 1050511 (5th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Allison, 447 F.3d 402 (5th Cir. 2006)	S		life term of supervised release	W	D	A	G	
U.S. v. Neal, 176 Fed.Appx. 542 (5th Cir. 2006)	F		115	W	D	A	G	
U.S. v. Gant, 176 Fed.Appx. 520 (5th Cir. 2006)	D			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 176 Fed.Appx. 449 (5th Cir. 2006)	D		37	W	D	A	G	
U.S. v. McDonald, 176 Fed.Appx. 43 (5th Cir. 2006)	T	37-46	37	W	D	A	G	
U.S. v. Hollins, 174 Fed.Appx. 855 (5th Cir. 2006)	S			W	D	A	G	
U.S. v. Reyes, 172 Fed.Appx. 626 (5th Cir. 2006)	D		12	W	D	A	G	
U.S. v. Meraz, 174 Fed.Appx. 196 (5th Cir. 2006)	I			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thomas, 172 Fed.Appx. 601 (5th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Jackson, 172 Fed.Appx. 599 (5th Cir. 2006)	D		324	W	D	A	G	
U.S. v. Ventura, 172 Fed.Appx. 585 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Salee, 170 Fed.Appx. 891 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Prado, 169 Fed.Appx. 917 (5th Cir. 2006)	D		188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Castillo, 169 Fed.Appx. 909 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Zuniga-Peralta, 442 F.3d 345 (5th Cir. 2006)	I		60	W	D	A	G	
U.S. v. Bailey, 169 Fed.Appx. 815 (5th Cir. 2006)	O		120	W	D	A	G	
U.S. v. Alonzo, 435 F.3d 551 (5th Cir. 2006)	D	24-30	30	W	D	A	G	
U.S. v. Matinez-Melchor, 161 Fed.Appx. 401 (5th Cir. 2006)	I		63	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Murietta-Maldonado, 161 Fed.Appx. 374 (5th Cir. 2006)	D			W	D	A	G	
U.S. v. Vega-Soto, 2006 WL 3326920 (5th Cir. 2006)	I		96	W	D	A	G	
U.S. v. Flores-Luevano, 2006 WL 3326911 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Garcia-Hernandez, 2006 WL 3231466 (5th Cir. 2006)	I		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hernandez-Ponce, 2006 WL 3230160 (5th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Mendoza-Galvan, 2006 WL 3147473 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Gonzales, 2006 WL 3059941 (5th Cir. 2006)	S		135	W	D	A	G	
U.S. v. Jimenez, 2006 WL 2852351 (5th Cir. 2006)	F		71	W	D	A	G	
U.S. v. Coleman, 2006 WL 2689866 (5th Cir. 2006)	F			W	D	A	G	
U.S. v. McLemore, 2006 WL 2683340 (5th Cir. 2006)	T			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Garcia-Garcia, 2006 WL 2474089 (5th Cir. 2006)	I		41	W	D	A	G	
U.S. v. Wood, 2006 WL 2350164 (5th Cir. 2006)	T		70	W	D	A	G	
U.S. v. Anaya-Valdez, 2006 WL 2089392 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Thomas, 2006 WL 2034641 (5th Cir. 2006)	F			W	D	A	G	
U.S. v. Rivero, 185 Fed.Appx. 378 (5th Cir. 2006)	D		292	W	D	A	G	
U.S. v. Le, 178 Fed.Appx. 386 (5th Cir. 2006)	O			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lizama-Diaz, 178 Fed.Appx. 396 (5th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Geeslin, 447 F.3d 408 (5th Cir. 2006)	T		37	W	D	A	G	
U.S. v. Ramirez-Rosas, 177 Fed.Appx. 379 (5th Cir. 2006)	I	70-87	70	W	D	A	G	
U.S. v. Villa, 173 Fed.Appx. 335 (5th Cir. 2006)	T			W	D	A	G	
U.S. v. Rojas-Duquez, 170 Fed.Appx. 908 (5th Cir. 2006)	I	57-71	60	W	D	A	G	
U.S. v. Ekene, 2006 WL 2465402 (5th Cir. 2006)	T			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Moody, 2006 WL 2861445 (5th Cir. 2006)	T		96	W	D	A	G	
U.S. v. Rivera-Cerda, 2006 WL 2711966 (5th Cir. 2006)	O			W	D	A	G	
U.S. v. Furlow, 2006 WL 2460894 (5th Cir. 2006)	T		51	W	D	A	G	
U.S. v. Hunter, 188 Fed.Appx. 315 (5th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Camarillo-De La Cruz, 174 Fed.Appx. 244 (5th Cir. 2006)	I			W	D	A	G	
U.S. v. Hidalgo-Peralta, 166 Fed.Appx. 762 (5th Cir. 2006)	O		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Orona, 166 Fed.Appx. 765 (5th Cir. 2006)	S			W	D	A	G	
U.S. v. Green, 162 Fed.Appx. 283 (5th Cir. 2006)	O		18	W	D	A	G	
U.S. v. Rivere, 178 Fed.Appx. 445 (5th Cir. 2006)	T		150	W	D	A	G	

SIXTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Anderson, 187 Fed.Appx. 517 (6th Cir. 2006)	O	12 - 18	36	A	Both	A	G	
U.S. v. Reid, 2006 WL 3314556 (6th Cir. 2006)	O	8-14	24	A	D	A	G	
U.S. v. Roberts, 2006 WL 2827679 (6th Cir. 2006)	D	77-96	132	A	D	A	G	
U.S. v. Lossia, 2006 WL 2431003 (6th Cir. 2006)	T	63 - 78	98	A	D	A	G	
U.S. v. Ferguson, 456 F.3d 660 (6th Cir. 2006)	O	0-6	12	A	D	A	G	
U.S. v. Barton, 455 F.3d 649 (6th Cir. 2006)	T	100 - 125	168	A	D	A	G	
U.S. v. Soto, 2006 WL 2045488 (6th Cir. 2006)	O	8 -14	24	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hopson, 2006 WL 1913414 (6th Cir. 2006)	F	63-78	84	A	D	A	G	
U.S. v. Mathney, 450 F.3d 633 (6th Cir. 2006)	F, D	24 - 30	36	A	D	A	G	
U.S. v. Brown, 163 Fed.Appx. 370 (6th Cir. 2006)	O	12 - 18	24	A	D	A	G	
U.S. v. Slodoba, 162 Fed.Appx. 550 (6th Cir. 2006)	O	3 - 9	12	A	D	A	G	
Johnson v. U.S., 179 Fed.Appx. 246 (6th Cir. 2006)	O	5 - 11	48	A	D	A	G	
U.S. v. Carr, 421 F.3d 425 (6th Cir. 2006)	O	? - 9	16	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mackie, 173 Fed.Appx. 427 (6th Cir. 2006)	O	5 - 11	24	A	D	A	G	
U.S. v. Mendoza, 2006 WL 2787017 (6th Cir. 2006)	D	135 - 168	200	A	D	A	G	
U.S. v. Ray, 2006 WL 2042651 (6th Cir. 2006)	S	235 - 290, 300 month statuto ry mandat ory min	600	A	D	R	D	P
U.S. v. Yopp, 453 F.3d 770 (6th Cir. 2006)	O	3-9	24	A	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jackson, 2006 WL 3059886 (6th Cir. 2006)	F	84 - 105	72	B	D	A	G	
U.S. v. Deveaux, 2006 WL 2827672 (6th Cir. 2006)	D	210 - 262	180	B	D	A	G	
U.S. v. Gardiner, 463 F.3d 445 (6th Cir. 2006)	O	97 - 121	80	B	D	A	G	
U.S. v. Fonseca, 2006 WL 2440978 (6th Cir. 2006)	D		168	B	D	A	G	
U.S. v. Fonseca, 2006 WL 2440978 (6th Cir. 2006)	D	151 - 188	70	B	D	A	G	
U.S. v. Gomez, 2006 WL 2168011 (6th Cir. 2006)	D, O	life	420	B	D	A	G	
U.S. v. Ybarra-Moreno, 2006 WL 2042918 (6th Cir. 2006)	I	57 - 71	54	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Carroll, 2006 WL 2042652 (6th Cir. 2006)	O	57 - 71	51	B	D	A	G	
U.S. v. Eason, 188 Fed.Appx. 383 (6th Cir. 2006)	D, O	life	480	B	D	A	G	
U.S. v. Redmond, 188 Fed.Appx. 377 (6th Cir. 2006)	T	33 - 41	30	B	D	A	G	
U.S. v. Currie, 183 Fed.Appx. 536 (6th Cir. 2006)	F	130 - 162	120	B	D	A	G	
U.S. v. Willis, 176 Fed.Appx. 653 (6th Cir. 2006)	D	262 - 327	240	B	D	A	G	
U.S. v. Savoca, 166 Fed.Appx. 183 (6th Cir. 2006)	T, F	927 - ?	840	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Satterfield, 2006 WL 2986449 (6th Cir. 2006)	D	87 - 108	36	B	D	A	G	
U.S. v. Ossa-Gallagos, 453 F.3d 371 (6th Cir. 2006)	I	41 - 51	33	B	D	A	G	
U.S. v. Collington, 461 F.3d 805 (6th Cir. 2006)	D	188 - 235	120	B	G	A	D	
U.S. v. Davis, 458 F.3d 491 (6th Cir. 2006)	T	30 - 37	1 day	B	G	R	G	S
U.S. v. Roberts, 2006 WL 2827679 (6th Cir. 2006)	D	life	life	mandat min.	D	A	G	
U.S. v. Roberts, 2006 WL 2827679 (6th Cir. 2006)	D	20 years (mand min)	240	mandat min.	D	A	G	
U.S. v. Caswell, 456 F.3d 652 (6th Cir. 2006)	F	46-57	51	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Johnson, 171 Fed.Appx. 499 (6th Cir. 2006)	F		86	W	D	A	G	
U.S. v Ely, 2006 WL 3313949 (6th Cir. 2006)	O	10 - 16	10	W	D	A	G	
U.S. v. Bernal-Aveja, 2006 WL 3314539 (6th Cir. 2006)	I	57 - 71	57	W	D	A	G	
U.S. v. Boyd, 2006 WL 3307476 (6th Cir. 2006)	F	100 - 120	120	W	D	A	G	
U.S. v. Waterford, 2006 WL 3279855 (6th Cir. 2006)	D	300 - 312	300	W	D	A	G	
U.S. v. McCaskill, 2006 WL 3026226 (6th Cir. 2006)	T	188 - 235	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Nickson, 2006 WL 2930105 (6th Cir. 2006)	T	46 - 57	57	W	D	A	G	
U.S. v. Washington, 2006 WL 2873368 (6th Cir. 2006)	G, F	21-27	21	W	D	A	G	
U.S. v. Foreman, 2006 WL 2873176 (6th Cir. 2006)	F	57 - 71	57	W	D	A	G	
U.S. v. Jones, 2006 WL 2769314 (6th Cir. 2006)	D	151 - 188	156	W	D	A	G	
U.S. v. Bowen, 2006 WL 2571992 (6th Cir. 2006)	D	360 - life	360	W	D	A	G	
U.S. v. Bergold, 2006 WL 2571999 (6th Cir. 2006)	D	84 - 105	84	W	D	A	G	
U.S. v. Dixon, 2006 WL 2572064 (6th Cir. 2006)	D	21 - 27	21	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Villa-Gomez, 2006 WL 2497885 (6th Cir. 2006)	T	151 - 188	152	W	D	A	G	
U.S. v. Cruz, 461 F.3d 752 (6th Cir. 2006)	O	97 - 121	108	W	D	A	G	
U.S. v. Whitemore, 2006 WL 2472855 (6th Cir. 2006)	F	92 - 115	94	W	D	A	G	
U.S. v. Fonseca, 2006 WL 2440978 (6th Cir. 2006)	D	121 - 151	121	W	D	A	G	
U.S. v. Morris, 2006 WL 2456964 (6th Cir. 2006)	T	46 - 57	46	W	D	A	G	
U.S. v. Underwood, 2006 WL 2381611 (6th Cir. 2006)	F, D		100	W	D	A	G	
U.S. v. Benson, 2006 WL 2380882 (6th Cir. 2006)	F, D	360 - life	360	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Harden, 2006 WL 2373259 (6th Cir. 2006)	F	188 - 235	188	W	D	A	G	
U.S. v. Cage, 458 F.3d 537 (6th Cir. 2006)	T	37 - 46	37	W	D	A	G	
U.S. v. Davis, 458 F.3d 505 (6th Cir. 2006)	O	37 - 46	37	W	D	A	G	
U.S. v. Jenkins, 2006 WL 2329372 (6th Cir. 2006)	F	100 - 125	100	W	D	A	G	
U.S. v. Sake, 2006 WL 2188707 (6th Cir. 2006)	D	97 - 121	120	W	D	A	G	
U.S. v. Wynn, 2006 WL 2168207 (6th Cir. 2006)	F	100 - 125	100	W	D	A	G	
U.S. v. Perez-Garcia, 2006 WL 2168196 (6th Cir. 2006)	I	77 - 96	77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Walker, 188 Fed.Appx. 433 (6th Cir. 2006)	T	188 - 235	208	W	D	A	G	
U.S. v. Henley, 2006 WL 2168216 (6th Cir. 2006)	D, O	46 - 57	52	W	D	A	G	
U.S. v. Melton, 188 Fed.Appx. 428 (6th Cir. 2006)	D	97 - 121	120	W	D	A	G	
U.S. v. Garcia-Perez, 2006 WL 2075253 (6th Cir. 2006)	I	? - 96	96	W	D	A	G	
U.S. v. Shoup, 188 Fed.Appx. 418 (6th Cir. 2006)	O	51 - 60	51	W	D	A	G	
U.S. v. Lynch, 188 Fed.Appx. 416 (6th Cir. 2006)	D		150	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Caraway, 2006 WL 2042895 (6th Cir. 2006)	F	262 - 327	302	W	D	A	G	
U.S. v. Greer, 2006 WL 2042653 (6th Cir. 2006)	O	12 - 18	12	W	D	A	G	
U.S. v. Harness, 453 F.3d 752 (6th Cir. 2006)	F	37 - 46	44	W	D	A	G	
U.S. v. Skibo, 188 Fed.Appx. 373 (6th Cir. 2006)	T	151 - 188	154	W	D	A	G	
U.S. v. Worley, 453 F.3d 706 (6th Cir. 2006)	D		152	W	D	A	G	
U.S. v. Mickens, 453 F.3d 668 (6th Cir. 2006)	T	30 - 37	30	W	D	A	G	
U.S. v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006)	I	30 - 37	30	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Zerilli, 187 Fed.Appx. 529 (6th Cir. 2006)	O	63 - 78	71	W	D	A	G	
U.S. v. Benson, 186 Fed.Appx. 648 (6th Cir. 2006)	T	360 - life	540	W	D	A	G	
U.S. v. Leppen, 187 Fed.Appx. 504 (6th Cir. 2006)	D	140 - ?	140	W	D	A	G	
U.S. v. Overton, 186 Fed.Appx. 607 (6th Cir. 2006)	D	210 - 262	210	W	D	A	G	
U.S. v. Sanford, 186 Fed.Appx. 614 (6th Cir. 2006)	F	92 - 115	92	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Haworth, 187 Fed.Appx. 458 (6th Cir. 2006)	S	41 - 51	41	W	D	A	G	
U.S. v. Louis, 185 Fed.Appx. 500 (6th Cir. 2006)	I	70 - 87	78	W	D	A	G	
U.S. v. Lumley, 185 Fed.Appx. 495 (6th Cir. 2006)	D		90	W	D	A	G	
U.S. v. Delaney, 185 Fed.Appx. 492 (6th Cir. 2006)	F	235 - 293	240	W	D	A	G	
U.S. v. Jackson, 186 Fed.Appx. 579 (6th Cir. 2006)	D	27 - 33	33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bustos, 186 Fed.Appx. 551 (6th Cir. 2006)	D, F	97-121	120	W	D	A	G	
U.S. v. Buchannan, 449 F.3d 731 (6th Cir. 2006)	F	77 - 96	77	W	D	A	G	
U.S. v. McWhirter, 184 Fed.Appx. 467 (6th Cir. 2006)	F		57	W	D	A	G	
U.S. v. Porter, 181 Fed.Appx. 545 (6th Cir. 2006)	D	235 - 293	235	W	D	A	G	
U.S. v. Speight, 183 Fed.Appx. 532 (6th Cir. 2006)	F	188 - 235	175	W	D	A	G	
U.S. v. Cheney, 183 Fed.Appx. 516 (6th Cir. 2006)	F	37 - 46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Morris, 448 F.3d 929 (6th Cir. 2006)	O	57 - 71, capped at 60	57	W	D	A	G	
U.S. v. Carrillo-Hernandez, 181 Fed.Appx. 522 (6th Cir. 2006)	I	27 - 33	27	W	D	A	G	
U.S. v. Crenshaw, 182 Fed.Appx. 440 (6th Cir. 2006)	F	92 - 115	115	W	D	A	G	
U.S. v. Ward, 447 F.3d 869 (6th Cir. 2006)	T, F	188 - 235	220	W	D	A	G	
U.S. v. Coffee, 180 Fed.Appx. 562 (6th Cir. 2006)	T		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Diaz, 179 Fed.Appx. 938 (6th Cir. 2006)	D	60 - 63	61	W	D	A	G	
U.S. v. Pickett, 179 Fed.Appx. 315 (6th Cir. 2006)	F			W	D	A	G	
U.S. v. Hill, 179 Fed.Appx. 280 (6th Cir. 2006)	F	46 - 57	46	W	D	A	G	
U.S. v. Jackson, 179 Fed.Appx. 283 (6th Cir. 2006)	F	92 - 115	108	W	D	A	G	
U.S. v. Jones, 445 F.3d 865 (6th Cir. 2006)	T	6 - 12	12	W	D	A	G	
U.S. v. Brown, 444 F.3d 519 (6th Cir. 2006)	F	262 - 327	280	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Nguyen, 176 Fed.Appx. 634 (6th Cir. 2006)	D	51 - 63	60	W	D	A	G	
U.S. v. Bolanos, 174 Fed.Appx. 320 (6th Cir. 2006)	D	70 - 87	84	W	D	A	G	
U.S. v. Cowan, 174 Fed.Appx. 307 (6th Cir. 2006)	T	46 - 57	50	W	D	A	G	
U.S. v. Mullins, 173 Fed.Appx. 400 (6th Cir. 2006)	O	4 - 10	8	W	D	A	G	
U.S. v. Hope, 167 Fed.Appx. 531 (6th Cir. 2006)	T	51-63	54	W	D	A	G	
U.S. v. Katzopoulus, 437 F.3d 569 (6th Cir. 2006)	T	33 - 41	33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ediger, 166 Fed.Appx. 218 (6th Cir. 2006)	T	33 - 41	36	W	D	A	G	
U.S. v. Richardson, 437 F.3d 550 (6th Cir. 2006)	T	151 - 188	180	W	D	A	G	
U.S. v. Alford, 436 F.3d 677 (6th Cir. 2006)	F	110 - 120	120	W	D	A	G	
U.S. v. Cortez, 166 Fed.Appx. 196 (6th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Williams, 436 F.3d 706 (6th Cir. 2006)	F	57 - 71	64	W	D	A	G	
U.S. v. Spates, 162 Fed.Appx. 592 (6th Cir. 2006)	T	27 - 33	27	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Till, 434 F.3d 880 (6th Cir. 2006)	F	151 - 188, stat. max of 120	120	W	D	A	G	
U.S. v. McBride, 434 F.3d 470 (6th Cir. 2006)	T	77 - 96	78	W	D	A	G	
U.S.v. Seymour, 2006 WL 3300002 (6th Cir. 2006)	S		262	W	D	A	G	
U.S. v. Moore, 180 Fed.Appx. 571 (6th Cir. 2006)	T	151 - 188	180	W	D	A	G	
U.S. v. Ibarra, 179 Fed.Appx. 317 (6th Cir. 2006)	I	46 - 57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Giles, 170 Fed.Appx. 414 (6th Cir. 2006)	F	77 - 96	84	W	D	A	G	
U.S. v. Johnson, 184 Fed.Appx. 498 (6th Cir. 2006)	D	135 - 168	144	W	D	A	G	
U.S. v. Johson, 2006 WL 3069075 (6th Cir. 2006)	F	30 - 37	30	W	D	R	D	P
U.S. v. Blackwell, 459 F.3d 739 (6th Cir. 2006)	O		72	W	D	A	G	

SEVENTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bullion, 466 F.3d 574 (7th Cir. 2006)	F	188-235	264	A	D	A	G	
U.S. v. Zimmer, 2006 WL 2864622 (7th Cir. 2006)	T	24-30	48	A	D	A	G	
U.S. v. Leahy, 464 F.3d 773 (7th Cir. 2006)	T	78-97	118	A	D	A	G	
U.S. v. Valle, 458 F.3d 652 (7th Cir. 2006)	T	100-125	139	A	D	A	G	
U.S. v. Howard, 454 F.3d 700 (7th Cir. 2006)	D	188-235	293	A	D	A	G	
U.S. v. Tautan, 185 Fed.Appx. 524 (7th Cir. 2006)	T	24-30	40	A	D	A	G	
U.S. v. Walker, 447 F.3d 999 (7th Cir. 2006)	O	168-210	240	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jones, 156 Fed. Appx. 852 (7th Cir. 2005)	O	8-14	18	A	D	A	G	
U.S. v. Filipiak, 466 F.3d 582 (7th Cir. 2006)	T	33-41	24	B	D	A	G	
U.S. v. Stevens, 2006 WL 2787777 (7th Cir. 2006)	D		145	B	D	A	G	
U.S. v. Watkins, 2006 WL 2787719 (7th Cir. 2006)	D	188-235	167	B	D	A	G	
U.S. v. Ibarra, 2006 WL 2016297 (7th Cir. 2006)	I	77-96	60	B	D	A	G	
U.S. v. Poole, 173 Fed.Appx. 488 (7th Cir. 2006)	T	108-135	60	B	D	A	G	
U.S. v. Hewlett, 453 F.3d 876 (7th Cir. 2006)	D	Life	240	B	G	A	D	
U.S. v. Baker, 445 F.3d 987 (7th Cir. 2006)	O, S	108-135	87	B	G	A	D	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Wallace, 458 F.3d 606 (7th Cir. 2006)	T	24-30	Probatio n	B	G	R	G	P
U.S. v. Jointer, 457 F.3d 682 (7th Cir. 2006)	D	135-168	87	B	G	R	G	S
U.S. v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006)	I	41-51	27	B	G	R	G	S
U.S. v. Repking, 2006 WL 3201034 (7th Cir. 2006)	T	41-51	1 day	B	G	R	G	S
U.S. v. Triliegi, 2006 WL 3147242 (7th Cir. 2006)	D	30-37	120	Mand. Min.	D	A	G	
U.S. v. Collins, 170 Fed. Appx 421 (7th Cir. 2006)	T	121-151	120	stat max	D	A	G	
U.S. v. Wurzinger, 2006 WL 3055954 (7th Cir. 2006)	D	210-262	262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Roberson, 2006 WL 3077144 (7th Cir. 2006)	D	168-210; 188-235; 210-262	180; 194; 210	W	D	A	G	
U.S. v. Roche-Martinez, 2006 WL 2972698 (7th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Lopez-Estrada, 2006 WL 3000746 (7th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Jordan, 2006 WL 2927424 (7th Cir. 2006)	D		180	W	D	A	G	
U.S. v. Perez, 2006 WL 2683440 (7th Cir. 2006)	D	360-Life	360	W	D	A	G	
U.S. v. Gonzalez, 462 F.3d 754 (7th Cir. 2006)	D	262-327	276	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 463 F.3d 598 (7th Cir. 2006)	O	37-46	37	W	D	A	G	
U.S. v. Flowers, 2006 WL 2528479 (7th Cir. 2006)	D		70	W	D	A	G	
U.S. v. Rinaldi, 461 F.3d 922 (7th Cir. 2006)	T	15-21	21	W	D	A	G	
U.S. v. Steele, 2006 WL 2422830 (7th Cir. 2006)	T	92-115	96	W	D	A	G	
U.S. v. Cooper, 461 F.3d 850 (7th Cir. 2006)	D		240	W	D	A	G	
U.S. v. Santamaria-Vasquez, 2006 WL 2433894 (7th Cir. 2006)	I		40	W	D	A	G	
U.S. v. Turner, 2006 WL 2457383 (7th Cir. 2006)	F	292-365	292	W	D	A	G	
U.S. v. Brazinskas, 458 F.3d 666 (7th Cir. 2006)	T	110-137	120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mendoza, 457 F.3d 726 (7th Cir. 2006)	T		108	W	D	A	G	
U.S. v. Bay, 2006 WL 2233215 (7th Cir. 2006)	T		32	W	D	A	G	
U.S. v. Rush, 2006 WL 2266985 (7th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Ramsey, 186 Fed.Appx. 686 (7th Cir. 2006)	F	18-24	21	W	D	A	G	
U.S. v. Garner, 454 F.3d 743 (7th Cir. 2006)	F	100-125	120	W	D	A	G	
U.S. v. Cardona, 2006 WL 2076422 (7th Cir. 2006)	D	168-210	168	W	D	A	G	
U.S. v. McLee, 2006 WL 2089199 (7th Cir. 2006)	T	262-327 + 60 mand. consec.	262 + 60	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Murph-Jackson, 187 Fed.Appx. 653 (7th Cir. 2006)	T		262	W	D	A	G	
U.S. v. Gurinas, 187 Fed.Appx. 647 (7th Cir. 2006)	T	15-21	15	W	D	A	G	
U.S. v. Gordon, 2006 WL 2045718 (7th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Tyra, 454 F.3d 686 (7th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Rosby, 454 F.3d 670 (7th Cir. 2006)	T, O		87	W	D	A	G	
U.S. v. Jones, 454 F.3d 642 (7th Cir. 2006)	D		300	W	D	A	G	
U.S. v. Santos, 2006 WL 2033698 (7th Cir. 2006)	D	120-135	120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Blue, 453 F.3d 948 (7th Cir. 2006)	F	46-57	46	W	D	A	G	
U.S. v. Grigg, 186 Fed.Appx. 679 (7th Cir. 2006)	S	37-46	37	W	D	A	G	
U.S. v. Graves, 184 Fed.Appx. 579 (7th Cir. 2006)	D	360-Life	360	W	D	A	G	
U.S. v. Gutierrez-Ruiz, 184 Fed.Appx. 564 (7th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Miller, 450 F.3d 270 (7th Cir. 2006)	D	262-327	300	W	D	A	G	
U.S. v. Ramirez-Ibarra, 182 Fed.Appx. 591 (7th Cir. 2006)	I		70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McKee, 182 Fed.Appx. 593 (7th Cir. 2006)	D		112	W	D	A	G	
U.S. v. Hale, 448 F.3d 971 (7th Cir. 2006)	O		480	W	D	A	G	
U.S. v. Payan, 182 Fed.Appx. 560 (7th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Lenover, 182 Fed.Appx. 563 (7th Cir. 2006)	D	Life	Life	W	D	A	G	
U.S. v. Farris, 448 F.3d 965 (7th Cir. 2006)	O		120	W	D	A	G	
U.S. v. Spano, 447 F.3d 517 (7th Cir. 2006)	T		78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thurman, 179 Fed.Appx. 971 (7th Cir. 2006)	D		96	W	D	A	G	
U.S. v. Trombetta, 177 Fed.Appx. 492 (7th Cir. 2006)	D		110	W	D	A	G	
U.S. v. Martinez, 173 Fed.Appx. 529 (7th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Mitchell, 176 Fed.Appx. 676 (7th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Leal, 175 Fed.Appx. 763 (7th Cir. 2006)	D	37-46	38	W	D	A	G	
U.S. v. Moore, 2006 WL 906435 (7th Cir. 2006)	T	41-51 33-41	41 33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Coleman, 175 Fed.Appx. 756 (7th Cir. 2006)	D	78-97	92	W	D	A	G	
U.S. v. Davis, 442 F.3d 1003 (7th Cir. 2006)	T		41	W	D	A	G	
U.S. v. Barnes, 173 Fed.Appx. 522 (7th Cir. 2006)	T		87	W	D	A	G	
U.S. v. Reyes-Acosta, 173 Fed.Appx. 494 (7th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006)	I	41-51	41	W	D	A	G	
United States v. Owens, 441 F.3d 486 (7th Cir. 2006)	T	57-71	60	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Andrlik, 173 Fed.Appx. 455 (7th Cir. 2006)	D	46-57	57	W	D	A	G	
U.S. v. Ellis, 440 F.3d 434 (7th Cir. 2006)	O	18-24	18	W	D	A	G	
U.S. v. Heintzelman, 170 Fed.Appx. 427 (7th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Sandoval-Vasquez, 435 F.3d 739 (7th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Cervantes-Lopez, 165 Fed. Appx. 485 (7th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Romero-Pedroza, 167 Fed. Appx. 576 (7th Cir. 2006)	I	57-71	64	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Brisson, 448 F.3d 989 (7th Cir. 2006)	T		30	W	D	A	G	
U.S. v. Marty, 450 F.3d 687 (7th Cir. 2006)	D	63-78	78	W	D	A	G	
U.S. v. Beatty, 189 Fed. Appx. (7th Cir. 2006)	F		62	W	D	A	G	
U.S. v. Tejeda-Lorenzo, 189 Fed. Appx. (7th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Juarez, 454 F.3d 717 (7th Cir. 2006)	F	235-293	240	W	D	A	G	
U.S. v. Brooks, 188 Fed. Appx. 520 (7th Cir. 2006)	O	151-188	155	W	D	A	G	
U.S. v. Murillo-Guerrero, 2006 WL 2547399 (7th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Scott, 2006 WL 2548413 (7th Cir. 2006)	D	151-181	151	W	D	A	G	
U.S. v. Thornton, 463 F.3d 693 (7th Cir. 2006)	F			W	D	A	G	
U.S. v. Loizzi, 2006 WL 2864624 (7th Cir. 2006)	D	188-235	211	W	D	A	G	
U.S. v. Fortner, 2006 WL 3016922 (7th Cir. 2006)	D	262-327	288	W	D	A	G	
U.S. v. Cortez-Mendez, 162 Fed. Appx.610 (7th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Rutherford, 158 Fed. Appx. 742 (7th Cir. 2006)	I		24	W	D	A	G	
U.S. v. Contreras, 159 Fed. Appx. 733 (7th Cir. 2006)	D	235-193	235	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hanson, 160 Fed. Appx 474 (7th Cir. 2006)	D	168-210	180	W	D	A	G	
U.S. v. Amuda, 160 Fed. Appx. 476 (7th Cir. 2006)	F		130	W	D	A	G	
U.S. v. Henry, 153 Fed. Appx. 977 (7th Cir. 2006)	D		262	W	D	A	G	
U.S. v. Barajas-Hernandez, 140 Fed. Appx. 626 (7th Cir. 2006)	I		18	W	D	A	G	
U.S. v. Melendez, 2006 WL 3040749 (7th Cir. 2006)	D	292-365	300	W	D	A	G	
U.S. v. Laufle, 433 F.3d 981 (7th Cir. 2006)	D	70-87	76	W	D	A	G	
U.S. v. Johnson, 161 Fed. Appx. 600 (7th Cir. 2006)	T	63-78	78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vaughn, 433 F.3d 917 (7th Cir. 2006)	T		112	W	D	A	G	
U.S. v. Cordero-Guzman, 2006 WL 3314514 (7th Cir. 2006)	I		18	W	D	A	G	
U.S. v. Smith, 2006 WL 2457462 (7th Cir. 2006)	F	12-18	12	W	D	R	D	P
U.S. v. Hankton, 463 F.3d 626 (7th Cir. 2006)	D D		300 210	W W	D D	A A	G G	

EIGHTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lyons, 450 F.3d 834 (8th Cir. 2006)	T	70-87	180	A	D	A	G	
U.S. v. Tensley, Jr., 2006 WL 2661154 (8th Cir. 2006)	F	63-78	84	A	D	A	G	
U.S. v. Mallory, 2006 WL 2441577 (8th Cir. 2006)	D	27-33	60	A	D	A	G	
U.S. v. Maurstad, 454 F.3d 787 (8th Cir. 2006)	D	41-51	120	A	D	A	G	
U.S. v. Meyer, 452 F.3d 998 (8th Cir. 2006)	S		270	A	D	A	G	
U.S. v. Bird, 450 F.3d 789 (8th Cir. 2006)	O	46-57	67	A	D	A	G	
U.S. v. Anderson, 440 F.3d 1013 (8th Cir. 2006)	T	87-108	120	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Porter, 439 F.3d 845 (8th Cir. 2006)	F	57-71	120	A	D	A	G	
U.S. v. Hawkman, 438 F.3d 879 (8th Cir. 2006)	F	161-171	228	A	D	A	G	
U.S. v. Ademi, 439 F.3d 964 (8th Cir. 2006)	I	37-46	47	A	D	A	G	
U.S v. Kelly, 436 F.3d 992 (8th Cir. 2006)	F	70-87	96	A	D	A	G	
U.S. v. Sitting Bear, 436 F.3d 929 (8th Cir. 2006)	O	151-188	228	A	D	A	G	
U.S. v. Marshall, 436 F.3d 929 (8th Cir. 2006)	O	151-188	228	A	D	A	G	
U.S. v. Larrabee, 436 F.3d 890 (8th Cir. 2006)	O	188-235	363	A	D	A	G	
U.S. v. Nelson, 453 F.3d 1004 (8th Cir. 2006)	D	4-10	24	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Chase, 451 F.3d 474 (8th Cir. 2006)	O	57-71	96	A	D	A	G	
U.S. v. Mack, 452 F.3d 744 (8th Cir. 2006)	S	30-37	51	A	D	A	G	
U.S. v. Hacker, 450 F.3d 808 (8th Cir. 2006)	T	92-115	180	A	D	A	G	
U.S. v. Porchia, 180 Fed.Appx. 596 (8th Cir. 2006)	D	6-12	24	A	D	A	G	
U.S. v. Larison, 432 F.3d 921 (8th Cir. 2006)	D	5-11	60	A	D	A	G	
U.S. v. Hawk Wing, 433 F.3d 622 (8th Cir. 2006)	T	6-12	18	A	D	A	G	
U.S. v. Kendall, 446 F.3d 782 (8th Cir. 2006)	D	27-33	84	A	D	R	D	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. D.A.L.D., 2006 WL 3230091 (8th Cir. 2006)	O	46-57	24	B	D	A	G	
U.S. v. Davis, 2006 WL 3161928 (8th Cir. 2006)	D	235-293	180	B	D	A	G	
U.S. v. Whipple, 2006 WL 2714924 (8th Cir. 2006)		292-365	240	B	D	A	G	
U.S. v. Pamperin, 456 F.3d 822 (8th Cir. 2006)	D	210-240	120	B	D	A	G	
U.S. v. Dieatrick, 2006 WL 1913440 (8th Cir. 2006)	S	120-?	72	B	D	A	G	
U.S. v. Longoria, 186 Fed.Appx. 699 (8th Cir. 2006)	T	70-87	48	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bassinger, 183 Fed.Appx. 588 (8th Cir. 2006)	D	?-240	216	B	D	A	G	
U.S. v. Pierce, 179 Fed.Appx. 975 (8th Cir. 2006)	F	27-33	21	B	D	A	G	
U.S. v. Alexander, 170 Fed.Appx. 992 (8th Cir. 2006)	D		12	B	D	A	G	
U.S. v. Berni, 439 F.3d 990 (8th Cir. 2006)	D	188-235	96	B	D	A	G	
U.S. v. Morin, 437 F.3d 777 (8th Cir. 2006)	D	324-405	264	B	D	A	G	
U.S. v. Olthoff, 437 F.3d 729 (8th Cir. 2006)	F	110-120	92	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Puckett, 163 Fed.Appx. 430 (8th Cir. 2006)	O		6	B	D	A	G	
U.S. v. Worthing, 434 F.3d 1046 (8th Cir. 2006)	T	151-188	120	B	D	A	G	
U.S. v. Gaver, 452 F.3d 1007 (8th Cir. 2006)	F	37-46	29	B	D	A	G	
U.S. v. Scott, 448 F.3d 1040 (8th Cir. 2006)	T	63-78	55	B	D	A	G	
U.S. v. Blanchard, 162 Fed.Appx. 655 (8th Cir. 2006)	D, F	324-405	228	B	D	A	G	
U.S. v. Krutsinger, 449 F.3d 827 (8th Cir. 2006)	O	70-87	24	B	G	A	D	
U.S. v. Maloney, 466 F.3d 663 (8th Cir. 2006)	F	360-life	180	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Beal, 463 F.3d 834 (8th Cir. 2006)	D	188-235	84	B	G	R	G	S
U.S. v. McDonald, 461 F.3d 948 (8th Cir. 2006)	D	262-327	132	B	G	R	G	S
U.S. v. Portillo, 458 F.3d 828 (8th Cir. 2006)	D	188-235	120	B	G	R	G	S
U.S. v. Robinson, 454 F.3d 839 (8th Cir. 2006)	F	63-78	Pro-bation	B	G	R	G	S
U.S. v. Brown, 453 F.3d 1024 (8th Cir. 2006)	D	360-life	240	B	G	R	G	S
U.S. v. Smith, 450 F.3d 856 (8th Cir. 2006)	D	262-327	204	B	G	R	G	P
U.S. v. Medearis, 451 f.3D 918 (8th Cir. 2006)	F, D	46-57	Pro-bation	B	G	R	G	S
U.S. v. Ture, 450 F.3d 352 (8th Cir. 2006)	O	12-18	Pro-bation+ service	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rogers, 448 F.3d 1033 (8th Cir. 2006)	F	51-63	12	B	G	R	G	S/P
U.S. v. Gall, 446 F.3d 884 (8th Cir. 2006)	D	30-37	probation	B	G	R	G	S
U.S. v. Bueno, 443 F.3d 1017 (8th Cir. 2006)	D	108-135	18	B	G	R	G	S
U.S. v. Lazenby, 439 F.3d 928 (8th Cir. 2006)	D	70-87	12	B	G	R	G	S
U.S. v. Rivera, 439 F.3d 446 (8th Cir. 2006)	D	188-235	60	B	G	R	G	P
U.S. v. Myers, 439 F.3d 415 (8th Cir. 2006)	F	37-46	12	B	G	R	G	P
U.S. v. Claiborne, 439 F.3d 479 (8th Cir. 2006)	D	37-46	15	B	G	R	G	S
U.S. v. Gatewood, 438 F.3d 894 (8th Cir. 2006)	F	63-78	36	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Shafer, 438 F.3d 1225 (8th Cir. 2006)	S	63-78	48	B	G	R	G	S
U.S. v. McMannus, 436 F.3d 871 8th Cir. 2006)	D	57-71	24	B	G	R	G	S
U.S. v. Brinton, 436 F.3d 871 (8th Cir. 2006)	D	262-327	120	B	G	R	G	S
U.S. v. Feemster, 435 F.3d 881 (8th Cir. 2006)	D	360-life	120	B	G	R	G	P
U.S. v. Collier, 2006 WL 2290513 (8th Cir. 2006)	D	188-235	72	B	G	R	G	P
U.S. v. Lee, 454 F.3d 836 (8th Cir. 2006)	D	262-327	120	B	G	R	G	S
U.S. v. Bradford, 447 F.3d 1026 (8th Cir. 2006)	F, D	110-137	36	B	G	R	G	S
U.S. v. Bryant, 446 F.3d 1317 (8th Cir. 2006)	D	70-87	30	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Givens, 443 F.3d 642 (8th Cir. 2006)	T	24-30	0	B	G	R	G	S
U.S. v. Goody, 442 F.3d 1132 (8th Cir. 2006)	D	168-210	72	B	G	R	G	S
U.S. v. Mentzos, II, 462 F.3d 830 (8th Cir. 2006)	S		480	W	D	A	G	
U.S. v. Perry, 2006 WL 3230094 (8th Cir. 2006)	T		21	W	D	A	G	
U.S. v. Larkins, 2006 WL 3208671 (8th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Muhammad, 2006 WL 3161928 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Francis, 2006 WL 3161928 (8th Cir. 2006)	D	360-life	420	W	D	A	G	
U.S. v. Francis, 2006 WL 3161928 (8th Cir. 2006)	D	life	life	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ellison, 2006 WL 314733 (8th Cir. 2006)	T		33	W	D	A	G	
U.S. v. Martinez, 2006 WL 3078924 (8th Cir. 2006)	I		84	W	D	A	G	
U.S. v. Perez, 2006 WL 2993390 (8th Cir. 2006)	D		100	W	D	A	G	
U.S. v. Crow, 2006 WL 2987304 (8th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Garcia-Sanchez, 2006 WL 2946826 (8th Cir. 2006)	D		108	W	D	A	G	
U.S. v. Ware, 2006 WL 2873245 (8th Cir. 2006)	F	46-57	57	W	D	A	G	
U.S. v. McCorkle, 2006 WL 2742323 (8th Cir. 2006)	F	57-71	64	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mosner, 2006 WL 2661156 (8th Cir. 2006)	T		188	W	D	A	G	
U.S. v. Stewart, 462 F.3d 960 (8th Cir. 2006)	O	292-360	300	W	D	A	G	
U.S. v. Huber, 462 F.3d 945 (8th Cir. 2006)	T		60	W	D	A	G	
U.S. v. Straughan, 462 F.3d 847 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Moore, 2006 WL 2561243	T		12	W	D	A	G	
U.S. v. Kiertzner, 460 F.3d 988 (8th Cir. 2006)	F		41	W	D	A	G	
U.S. v. Plumman, 188 Fed.Appx. 529 (8th Cir. 2006)	S	?-life	384	W	D	A	G	
U.S. v. Winston, 456 F.3d 861 (8th Cir. 2006)	D		262	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Foote, 454 F.3d 787 (8th Cir. 2006)	D	210-262	240	W	D	A	G	
U.S. v. Oslund, 453 F.3d 1048 (8th Cir. 2006)	F, T	?-life	life	W	D	A	G	
U.S. v. Adams, 451 F.3d 471 (8th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Gregg, 451 F.3d 930 (8th Cir. 2006)	O	135-168	135	W	D	A	G	
U.S. v. Mathis, 451 F.3d 939 (8th Cir. 2006)	S		214	W	D	A	G	
U.S. v. Lee, 451 F.3d 914 (8th Cir. 2006)	D, F	346-411	346	W	D	A	G	
U.S. v. Dunlap, 452 F.3d 747 (8th Cir. 2006)	D		70	W	D	A	G	
U.S. v. Gladney, 184 Fed.Appx. 586 (8th Cir. 2006)	D	188-235	188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Walker, 2006 WL 1596805 (8th Cir. 2006)	T		87	W	D	A	G	
U.S. v. Snider, 2006 WL 1594429 (8th Cir. 2006)	D		196	W	D	A	G	
U.S. v. Nuno-Alvarez, 182 Fed.Appx. 630 (8th Cir. 2006)	D		87	W	D	A	G	
U.S. v. Espinoza-Naranjo, 182 Fed.Appx. 610 (8th Cir. 2006)	I, D	77-96	42 + time served	W	D	A	G	
U.S. v. Erby, 180 Fed.Appx. 637 (8th Cir. 2006)	F		40	W	D	A	G	
U.S. v. Cazares-Gonzales, 182 Fed.Appx 603 (8th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Aguilar-Martinez, 181 Fed.Appx. 612 (8th Cir. 2006)	D		322	W	D	A	G	
U.S. v. Williams, 180 Fed.Appx. 615 (8th Cir. 2006)	F		41	W	D	A	G	
U.S. v. Willis, 180 Fed.Appx. 605 (8th Cir. 2006)	T		180	W	D	A	G	
U.S. v. Anderson, 446 F.3d 870 (8th Cir. 2006)	O	15-21	21	W	D	A	G	
U.S. v. Jeremiah, 446 F.3d 805 (8th Cir. 2006)	S		27	W	D	A	G	
U.S. v. Dion, 178 Fed.Appx. 609 (8th Cir. 2006)	T		36	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Darks, 446 F.3d 762 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Ruiz, 446 F.3d 762 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Turner, 178 Fed.Appx. 600 (8th Cir. 2006)	D	57-71	71	W	D	A	G	
U.S. v. Bell, 445 F.3d 1086 (8th Cir. 2006)	T		100	W	D	A	G	
U.S. v. Cadenas, 445 F.3d 1091 (8th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Mugan, 441 F.3d 622 (8th Cir. 2006)	S	210-262	240	W	D	A	G	
U.S. v. Green, 442 F.3d 677 (8th Cir. 2006)	D	87-105	105	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mendoza-Mendoza, 172 Fed.Appx. 130 (8th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Ramirez-Becerra, 170 Fed.Appx. 982 (8th Cir. 2006)	D	120-135	120	W	D	A	G	
U.S. v. Magana-Suarez, 170 Fed.Appx. 983 (8th Cir. 2006)	I		30	W	D	A	G	
U.S. v. Cabrera-Villegas, 170 Fed.Appx. 990 (8th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Anderson, 170 Fed.Appx. 996 (8th Cir. 2006)	T		210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Arroyo-Santiago, 174 Fed.Appx. 349 (8th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Allaei, 174 Fed. Appx. 350 (8th Cir. 2006)	D	24-30	24	W	D	A	G	
U.S. v. White, 439 F.3d 433 (8th Cir. 2006)	F	30-37	36	W	D	A	G	
U.S. v. Tabor, 439 F.3d 826 (8th Cir. 2006)	D		200	W	D	A	G	
U.S. v. Henderson, 440 F.3d 453 (8th Cir. 2006)	O		63	W	D	A	G	
U.S. v. Jacinto, 168 Fed.Appx. 129 (8th Cir. 20060	F		37	W	D	A	G	
U.S. v. Bates, 167 Fed.Appx. 581 (8th Cir. 2006)	O		10	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Reams, 167 Fed.Appx. 584 (8th Cir. 2006)	F		30	W	D	A	G	
U.S. v. Cain, 167 Fed.Appx. 580 (8th Cir. 2006)	T	168-210	168	W	D	A	G	
U.S. v. Sebastian, 436 F.3d 913 (8th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Alvaro-Reyes, 163 Fed.Appx. 449 (8th Cir. 2006)	D		87	W	D	A	G	
U.S. v. Simmons, 168 Fed.Appx. 124 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Grant, 165 Fed.Appx. 493 (8th Cir. 2006)	D	151-188	170	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tucker, 161 Fed.Appx. 629 (8th Cir. 2006)	D		9	W	D	A	G	
U.S. v. Hill, 163 Fed.Appx. 438 (8th Cir. 2006)	F	188-235	200	W	D	A	G	
U.S. v. Denton, 434 F.3d 1104 (8th Cir. 2006)	D	life	life	W	D	A	G	
U.S. v. Smith, 163 Fed.Appx. 433 (8th Cir. 2006)	T			W	D	A	G	
U.S. v. Reyes, 162 Fed.Appx. 685 (8th Cir. 2006)	D	?-87	87	W	D	A	G	
U.S. v. Artis, 161 Fed.Appx. 627 (8th Cir. 2006)	T		46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Wade, 435 F.3d 828 (8th Cir. 2006)	T	18-24	18	W	D	A	G	
U.S. v. Dao, 2006 WL 2472749 (8th Cir. 2006)	D	63-78	63	W	D	A	G	
U.S. v. Floyd, 458 F.3d 844 (8th Cir. 2006)	O		33	W	D	A	G	
U.S. v. Pippert, 458 F.3d 844 (8th Cir. 2006)	O		36	W	D	A	G	
U.S. v. Arther, 2006 WL 2372159 (8th Cir. 2006)	F	77-96	96	W	D	A	G	
U.S. v. Wiig, 2006 WL 2321230 (8th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Davis, 457 F.3d 817 (8th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Brown, 2006 WL 2192716 (8th Cir. 2006)	F		12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Whitrock, 454 F.3d 866 (8th Cir. 2006)	T	168-210	180	W	D	A	G	
U.S. v. Johnson, 187 Fed.Appx. 669 (8th Cir. 2006)	D, F	240-262	240	W	D	A	G	
U.S. v. Valencia, 186 Fed.Appx. 711 (8th Cir. 2006)	D		180	W	D	A	G	
U.S. v. Pappas, 452 F.3d 767 (8th Cir. 2006)	F	77-96	77	W	D	A	G	
U.S. v. Bowers, 182 Fed.Appx. 624 (8th Cir. 2006)	D, F	135-168	135	W	D	A	G	
U.S. v. Urbina-Hernandez, 182 Fed.Appx. 617 (8th Cir. 2006)	I		48	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mull, 181 Fed.Appx. 610 (8th Cir. 2006)	D	97-?	97	W	D	A	G	
U.S. v. Milk, 447 F.3d 593 (8th Cir. 2006)	O	135-168	135	W	D	A	G	
U.S. v. Annis, 446 F.3d 852 (8th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Lee, 178 Fed.Appx. 603 (8th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Tucker, 178 Fed.Appx. 601 (8th Cir. 2006)	D	70-87	70	W	D	A	G	
U.S. v. Love, 176 Fed.Appx. 708 (8th Cir. 2006)	F		70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vasquex-Cardona, 175 Fed.Appx. 105 (8th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Mennen, 175 Fed.Appx. 103 (8th Cir. 2006)	D	70-87	87	W	D	A	G	
U.S. v. Searby, 439 F.3d 961 (8th Cir. 2006)	S	151-180	160	W	D	A	G	
U.S. v. Walker, 439 F.3d 890 (8th Cir. 2006)	T	4-10	5	W	D	A	G	
U.S. v. Sanchez, 169 Fed.Appx. 491 (8th Cir. 2006)	D	63-78	63	W	D	A	G	
U.S. v. Barron, 166 Fed.Appx. 890 (8th Cir. 2006)	D	121-151	136	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Davidson, 437 F.3d 737 (8th Cir. 2006)	D, F		300	W	D	A	G	
U.S. v. Rivera-Moreno, 161 Fed.Appx. 622 (8th Cir. 2006)	D		292	W	D	A	G	
U.S. v. Enos, 161 Fed.Appx. 620 (8th Cir. 2006)	D		70	W	D	A	G	
U.S. v. Mickelson, 433 F.3d 1050 (8th Cir. 2006)	S	41-51	51	W	D	A	G	
U.S. v. Dieken, 432 F.3d 906 (8th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Goodwin, 439 F.3d 928 (8th Cir. 2006)	D	87-108	87	W	D	R	D	S
U.S. v. Okai, 454 F.3d 848 (8th Cir. 2006)	T	2-8	8	W	G	R	G	P

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sauerbry, 2006 WL 3147483 (8th Cir. 2006)	O		12	W	D	A	G	
U.S. v. Caldwell, 2006 WL 2404500 (8th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Valdivia-Perez, 185 Fed.Appx. 543 (8th Cir. 2006)	D, F		life	W	D	A	G	
U.S. v. Walker, 185 Fed.Appx. 554 (8th Cir. 2006)	D		235	W	D	A	G	
U.S. v. Dawn, 180 Fed.Appx. 617 (8th Cir. 2006)	F		180	W	D	A	G	
U.S. v. Atteberry, 447 F.3d 562 (8th Cir. 2006)	S		120	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Aviles, 446 F.3d 762 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Vergara-Viernes, 175 Fed.Appx. 100 (8th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Vaughn, 173 Fed.Appx. 532 (8th Cir. 2006)	F			W	D	A	G	
U.S. v. Gray, 163 Fed.Appx. 448 (8th Cir. 2006)	D			W	D	A	G	
U.S. v. Marbach, 163 Fed.Appx. 434 (8th Cir. 2006)	O		24	W	D	A	G	
U.S. v. Stead, 162 Fed.Appx. 678 (8th Cir. 2006)	O			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-lines Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 159 Fed.Appx. 748 (8th Cir. 2006)	D		70	W	D	A	G	

NINTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Booth, 2006 WL 2521544 (9th Cir. 2006)	T		162	A	D	A	G	
U.S. v. Coppola, 2006 WL 2460804 (9th Cir. 2006)	T		188	A	D	A	G	
U.S. v. Ackerman, 2006 WL 2404573 (9th Cir. 2006)	O		180	A	D	A	G	
U.S. v. Mix, 457 F.3d 906 (9th Cir. 2006)	S & O		Life	A	D	A	G	
U.S. v. Mohamed, 459 F.3d 979 (9th Cir. 2006)	F	12-18	60	A	D	A	G	
U.S. v. Ellsworth, 456 F.3d 1146 (9th Cir. 2006)	F		78	A	D	A	G	
U.S. v. Menz, 2006 WL 2099290 (9th Cir. 2006)	O	30-37	40	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jeakins, 2006 WL 1642654 (9th Cir. 2006)	S		168	A	D	A	G	
U.S. v. DeGeorge, 178 Fed. Appx. 764 (9th Cir. 2006)	T			A	D	A	G	
U.S. v. Williamson, 439 F.3d 1125 (9th Cir. 2006)	S		180	A	D	A	G	
U.S. v. Bad Marriage, 439 F.3d 534 (9th Cir. 2006)	O	33-41	48	A	D	A	G	
U.S. v. Soza-Balderama, 163 Fed. Appx. 571 (9th Cir. 2006)	I		51	A	D	A	G	
U.S. v. Wise, 166 Fed. Appx. 986 (9th Cir. 2006)	O			A	D	A	G	
U.S. v. Guerrieri, 184 Fed. Appx. 630 (9th Cir. 2006)	S		262	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Castaneda-Ceja, 2006 WL 3313199	I		52	A	D	A	G	
U.S. v. Espinoza-Cortez, 169 Fed. Appx. 492 (9th Cir. 2006)	I	77-96	102	A	D	A	G	
U.S. v. Mohamed, 2006 WL 3147268 (9th Cir. 2006)	T & O	0-6	18	A	D	A	G	
U.S. v. Roberts, 2006 WL 2136144 (9th Cir. 2006)	O		36	A	D	A	G	
U.S. v. Miqbel, 444 F.3d 1173 (9th Cir. 2006)	O	3-9	12	A	D	R	D	P
U.S. v. Branch, 2006 WL 2373468	T		200	B	D	A	G	
U.S. v. Martinez-De Loza, 2006 WL 2076704	I		40	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Cruz-Lemus, 2006 WL 2087516 (9th Cir. 2006)	I	77-96	48	B	D	A	G	
U.S. v. O'Neill, 2006 WL 2053533 (9th Cir. 2006)	T		24	B	D	A	G	
U.S. v. Cano-Ramirez, 2006 WL 2041497 (9th Cir. 2006)	I		60	B	D	A	G	
U.S. v. Silva, 2006 WL 1962999 (9th Cir. 2006)	I		46	B	D	A	G	
U.S. v. Davis, 182 Fed. Appx. 741 (9th Cir. 2006)	S		60	B	D	A	G	
U.S. v. Hutson, 183 Fed. Appx. 675 (9th Cir. 2006)	T	210-262	180	B	D	A	G	
U.S. v. Reina-Rodriguez, --- F.3d ---, 2006 WL 3302652 (9th Cir. 2006)	I	57-71	51	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Evenilso-Cruz, 176 Fed. Appx. 872 (9th Cir. 2006)	I		30	B	D	A	G	
U.S. v. Usanga, 2006 WL 2661163 (9th Cir. 2006)	T		18	B	D	A	G	
U.S. v. Shpirt, 2006 WL 2102338 (9th Cir. 2006)	T			B	D	A	G	
U.S. v. Lizarraga-Cedano, 2006 WL 2063066	D	Life		B	D	A	G	
U.S. v. Aguilar-Delgado, 2006 WL 2466249 (9th Cir. 2006)	I	57-71	46	B	D	A	G	
U.S. v. Postadan, 2006 WL 3228722 (9th Cir. 2006)	D	292-365	200	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pryce, 2006 WL 2166721 (9th Cir. 2006)	D		60	B	D	A	G	
U.S. v. Rosell-Fernandez, 2006 WL 2063080 (9th Cir. 2006)	I	77-96	60	B	D	A	G	
U.S. v. Landrus, 183 Fed. Appx. 649 (9th Cir. 2006)	D	360-Life	300	B	D	A	G	
U.S. v. Kulgavchuck, 183 Fed. Appx. 647 (9th Cir. 2006)	D	292-365	180	B	D	A	G	
U.S. v. Rocha, 180 Fed. Appx. 660 (9th Cir. 2006)	F	10-16	7	B	D	A	G	
U.S. v. Gonzalez, 178 Fed. Appx. 640 (9th Cir. 2006)	T			B	D	A	G	
U.S. v. Tapia-Piceno, 2006 WL 2669038 (9th Cir. 2006)	D	87-108	74	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Tapia-Piceno, 2006 WL 2669038 (9th Cir. 2006)	D	41-51	36	B	D	A	G	
U.S. v. Gibbons, 2006 WL 2358005 (9th Cir. 2006)	T	78-97	60	B	D	A	G	
U.S. v. Gibson, 2006 WL 2357407 (9th Cir. 2006)	T	46-57	30	B	D	A	G	
U.S. v. Fernandez-Esparza, 2006 WL 2136150 (9th Cir. 2006)	I	57-71	54	B	D	A	G	
U.S. v. Khan, 2006 WL 2096059 (9th Cir. 2006)	T		24	B	G	A	D	
U.S. v. Williams, 171 Fed. Appx. 604 (9th Cir. 2006)			15	B	G	A	D	
U.S. v. Atkinson, 180 Fed. Appx. 656 (9th Cir. 2006)	T	77-96	9	B	G	R	G	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Beraldo, 2006 WL 2088168 (9th Cir. 2006)	O	51-63	24	stat. max.	D	A	G	
U.S. v. Ramirez-Campos, 2006 WL 3040050 (9th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Spears, 172 Fed. Appx. 216 (9th Cir. 2006)	D	33-41	36	W	D	A	G	
U.S. v. Bearcub, 2006 WL 2615083 (9th Cir. 2006)	S			W	D	A	G	
U.S. v. Garcia-Cortez, 2006 WL 2466919 (9th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Anzo-Enriquez, 2006 WL 2990118 (9th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Nichols, 464 F.3d 1117 (9th Cir. 2006)	F	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera-Lara, 2006 WL 2661172 (9th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Altamirano-Ortiz, 2006 WL 2661145 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Garcia-Rubio, 2006 WL 2661139 (9th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Whitright, 2006 WL 2563474 (9th Cir. 2006)	O		108	W	D	A	G	
U.S. v. Vasquez, 2006 WL 2521446 (9th Cir. 2006)				W	D	A	G	
U.S. v. Maciel-Vasquez, 458 F.3d 994 (9th Cir. 2006)	I		36	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Morales, 2006 WL 2233228 (9th Cir. 2006)	O	4-10	10	W	D	A	G	
U.S. v. Gotty, 2006 WL 2096084 (9th Cir. 2006)	T		170	W	D	A	G	
U.S. v. Arrendondo, 2006 WL 2076564 (9th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Gasca-Morado, 2006 WL 2085396 (9th Cir. 2006)	I			W	D	A	G	
U.S. v. Castro-Muro, 2006 WL 2063063 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Miranda-Sanchez, 2006 WL 1878689 (9th Cir. 2006)	I			W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Clark, 452 F.3d 1082 (9th Cir. 2006)	F		46	W	D	A	G	
U.S. v. Vega-Barajas, 185 Fed. Appx. 579 (9th Cir. 2006)	I, F		57	W	D	A	G	
U.S. v. Reyes-Osorto, 184 Fed. Appx. 628 (9th Cir. 2006)	I		87	W	D	A	G	
U.S. v. Lopez-Lopez, 180 Fed. Appx. 680 (9th Cir. 2006)	I	70-87	70	W	D	A	G	
U.S. v. Oros-Rodriguez, 180 Fed. Appx. 677 (9th Cir. 2006)	I			W	D	A	G	
U.S. v. Larumbe-Zuniga, 182 Fed. Appx. 651 (9th Cir. 2006)			77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Atondo-Santos, 178 Fed. Appx. 760 (9th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006)	I	57-71	66	W	D	A	G	
U.S. v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006)	I	41-51	46	W	D	A	G	
U.S. v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006)	I	41-51	50	W	D	A	G	
U.S. v. Lacson, 177 Fed. Appx. 751 (9th Cir. 2006)	T	30-37	30	W	D	A	G	
U.S. v. Romero-Martinez, 443 F.3d 1185 (9th Cir. 2006)	F	51-63	54	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Bowman, 175 Fed. Appx. 834 (9th Cir. 2006)	S	33-41	33	W	D	A	G	
U.S. v. Maldonado-Gutierrez, 175 Fed. Appx. 795 (9th Cir. 2006)				W	D	A	G	
U.S. v. Becerra-Cortez, 170 Fed. Appx. 481 (9th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Espino-Acata, 170 Fed. Appx. 467 (9th Cir. 2006)	I	46-57	57	W	D	A	G	
U.S. v. Jari, 168 Fed. Appx. 796 (9th Cir. 2006)	T	33-41	33	W	D	A	G	
U.S. v. Barrientos-Maldonado, 168 Fed. Appx. 829 (9th Cir. 2006)	I		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sylvester Norman Knows His Gun, III, 438 F.3d 913 (9th Cir. 2006)	S	121-151	132	W	D	A	G	
U.S. v. Plouffe, 445 F.3d 1126 (9th Cir. 2006)	O	57-71	71	W	D	A	G	
U.S. v. Valdovinos, 2006 WL 2661236 (9th Cir. 2006)		360-?	360	W	D	A	G	
U.S. v. Day, 2006 WL 2071038 (9th Cir. 2006)	F		33	W	D	A	G	
U.S. v. Hernandez-Garcia, 2006 WL 1933088 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Souza, 176 Fed. Appx. 852 (9th Cir. 2006)	D			W	D	A	G	
U.S. v. Fajardo, 175 Fed. Appx. 922 (9th Cir. 2006)	T	15-21	15	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sifuentes Ibarra, 171 Fed. Appx. 195 (9th Cir. 2006)	I		64	W	D	A	G	
U.S. v. Espinoza-Cano, 456 F.3d 1126 (9th Cir. 2006)	I	37-46	37	W	D	A	G	
U.S. v. Martinez, 177 Fed. Appx. 635 (9th Cir. 2006)	I			W	D	A	G	
U.S. v. Mares-Hernandez, 163 Fed. Appx. 561 (9th Cir. 2006)	I		70	W	D	A	G	
U.S. v. Alarid, 2006 WL 3026176 (9th Cir. 2006)	D		130	W	D	A	G	
U.S. v. Soukas, 2006 WL 3005628 (9th Cir. 2006)	T	92-115	92	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mendoza-Santiago, 2006 WL 3017524 (9th Cir. 2006)	I	57-71	63	W	D	A	G	
U.S. v. Nichol, 2006 WL 2818056 (9th Cir. 2006)	D	121-151	121	W	D	A	G	
U.S. v. Rice, 2006 WL 2818056 (9th Cir. 2006)	D		84	W	D	A	G	
U.S. v. Guzman-Valencia, 2006 WL 2827868 (9th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Bromlie, 2006 WL 2827857 (9th Cir. 2006)	F	77-96	96	W	D	A	G	
U.S. v. Marquez-Lerma, 2006 WL 2827735 (9th Cir. 2006)	D		151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Cisneros-Gonzalez, 2006 WL 2661169 (9th Cir. 2006)	I		51	W	D	A	G	
U.S. v. Ramirez-Cruz, 2006 WL 2637909 (9th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Delgado, 2006 WL 2637478 (9th Cir. 2006)	I	33-41	33	W	D	A	G	
U.S. v. Tran, 2006 WL 2521442 (9th Cir. 2006)		188-235	212	W	D	A	G	
U.S. v. Sanchez-Macias, 2006 WL 2497593 (9th Cir. 2006)	D		48	W	D	A	G	
U.S. v. Ochoa, 2006 WL 2460723 (9th Cir. 2006)	D & O	70-87	87	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Squetimkin, 2006 WL 2233247 (9th Cir. 2006)	S	63-78	78	W	D	A	G	
U.S. v. Zuniga-Camarena, 2006 WL 2170516 (9th Cir. 2006)	I	8-14	13	W	D	A	G	
U.S. v. Serrano-Aguilar, 2006 WL 2096080 (9th Cir. 2006)	I	24-36	24	W	D	A	G	
U.S. v. Hernandez-Toscano, 2006 WL 2136152 (9th Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Serrano, 2006 WL 2085241 (9th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Garner, 2006 WL 2071448 (9th Cir. 2006)	D & T		98	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Gable, 2006 WL 2074670 (9th Cir. 2006)	O	12-18	12	W	D	A	G	
U.S. v. McGrew, 2006 WL 2070762 (9th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Gordiano-Vergara, 2006 WL 1877207 (9th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Wideman, 187 Fed. Appx. 758 (9th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Martinez-Huerts, 187 Fed. Appx. 721 (9th Cir. 2006)	I	63-78	78	W	D	A	G	
U.S. v. Guinn, 186 Fed. Appx. 798 (9th Cir. 2006)	D	10-16	13	W	D	A	G	
U.S. v. Flowers, 185 Fed. Appx. 669 (9th Cir. 2006)	D	292-365	312	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Marshall, 185 Fed. Appx 578 (9th Cir. 2006)	O	27-33	27	W	D	A	G	
U.S. v. Ortega-Frutos, 2006 WL 3313321 (9th Cir. 2006)	I	77-96	96	W	D	A	G	
U.S. v. Duenas-Jimenez, 2006 WL 3313203 (9th Cir. 2006)	D	51-63	51	W	D	A	G	
U.S. v. Blanco-Gallegos, 2006 WL 3313297 (9th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Deminter, 2006 WL 3312034 (9th Cir. 2006)	T	63-78	63	W	D	A	G	
U.S. v. Lozano Castaneda, 2006 WL 3308361 (9th Cir. 2006)	D	30-37	30	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Balitan, 182 Fed. Appx. 636 (9th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Andres, 178 Fed. Appx. 736 (9th Cir. 2006)	O	41-51	41	W	D	A	G	
U.S. v. Andres, 178 Fed. Appx. 736 (9th Cir. 2006)	O	63-78	65	W	D	A	G	
U.S. v. Mott, 178 Fed. Appx. 634 (9th Cir. 2006)	D	27-33	27	W	D	A	G	
U.S. v. Montalvo-Villa, 177 Fed. Appx. 724 (9th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Bobadilla-Diaz, 176 Fed. Appx. 858 (9th Cir. 2006)	T	10-16	16	W	D	A	G	
U.S. v. Rodriquez-Rodriguez, 441 F.3d 767 (9th Cir. 2006)	I	77-96	77	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Medina-Leon, 172 Fed. Appx. 753 (9th Cir. 2006)	I	21-27	27	W	D	A	G	
U.S. v. Calvillo-Alvarez, 166 Fed. Appx. 983 (9th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Canter, 164 Fed. Appx. 648 (9th Cir. 2006)			51	W	D	A	G	
U.S. v. Martinez-Rosales, 164 Fed. Appx. 618 (9th Cir. 2006)	I	12-18	18	W	D	A	G	
U.S. v. Wenee, 2006 WL 3007727 (9th Cir. 2006)	F	37-46	42	W	D	A	G	
U.S. v. Garcia-Gonzalez, 2006 WL 2639376 (9th Cir. 2006)	I		70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Morales-Castro, 2006 WL 2466274 (9th Cir. 2006)	I		54	W	D	A	G	
U.S. v. McDonald, 178 Fed. Appx. 643 (9th Cir. 2006)	T	41-51	41	W	D	A	G	
U.S. v. Jacques, 170 Fed. Appx. 476 (9th Cir. 2006)	D	84-105	84	W	D	A	G	
U.S. v. Ramos-Contreras, 2006 WL 2099778 (9th Cir. 2006)	I		77	W	D	A	G	
U.S. v. Lucero, 164 Fed. Appx. 594 (9th Cir. 2006)	D			W	D	A	G	
U.S. v. Molesworth, 2006 WL 2404576 (9th Cir. 2006)	T		13	W	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006)	I		46	W	D	R	D	P
U.S. v. Robles-Ayala, 2006 WL 2612686 (9th Cir. 2006)	I	46-57	52	W	D	R	D	P
U.S. v. Flores-Pimienta, 2006 WL 2404503 (9th Cir. 2006)	I	15-21	15	W	D	R	D	P
U.S. v. Vivas, 2006 WL 2357819 (9th Cir. 2006)	F	84-105	84	W	D	R	D	P
U.S. v. Aguilar, 169 Fed. Appx. 503 (9th Cir. 2006)	D	87-108	96	W	D	R	D	P
U.S. v. Ventura, 164 Fed. Appx. 600 (9th Cir. 2006)	T	8-14	12	W	G	A	D	
U.S. v. Vergara-Romano, 2006 WL 2087552 (9th Cir. 2006)	I	77-96	54	W (fast track max)	D	A	G	

TENTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Toliver, 183 Fed. Appx. 745 (10th Cir. 2006)	O	8-14	22	A	D	A	G	
U.S. v. Roubideaux, 176 Fed. Appx. 941 (10th Cir. 2006)	O	5-11	18	A	D	A	G	
U.S. v. Baker, 175 Fed. Appx. 958 (10th Cir. 2006)	O	188-235	264	A	D	A	G	
U.S. v. Valtierra-Rojas, --F.3d--, 2006 WL 3237187 (10th Cir. 2006)	I	21-27	60	A	D	A	G	
U.S. v. Bishop, --F.3d--, 2006 WL 3237027 (10th Cir. 2006)	F	46-57	78	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pettigrew, --F.3d--, 2006 WL 2946893 (10th Cir. 2006)	O	100-125	126	A	D	A	G	
U.S. v. Cordova, 461 F.3d 1184 (10th Cir. 2006)	O	9-21	36	A	D	A	G	
U.S. v. Dallah, 2006 WL 2294848 (10th Cir. 2006)	O	15-21	36	A	D	A	G	
U.S. v. Terrell, 445 F.3d 1261 (10th Cir. 2006)	D	92-115	78	B	D	A	G	
U.S. v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006)	I	41-51	30	B	D	A	G	
U.S. v. Franklin, 178 Fed. Appx. 776 (10th Cir. 2006)	T	21-27	18	B	D	A	G	
U.S. v. Hernandez-Bustos, 2006 WL 2361642 (10th Cir. 2006)	D	135-	100	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sutherland, 2006 WL 2328752 (10th Cir. 2006)	S	360-Life	240	B	D	A	G	
U.S. v. Mosley, 457 F.3d 1150 (10th Cir. 2006)	D	188-235	120	B	D	A	G	
U.S. v. Cage, 451 F.3d 585 (10th Cir. 2006)	D	46-57	6 days	B	G	R	G	S
U.S. v. Bailey 187 Fed. Appx. 846 (10th Cir. 2006)	D, F	136-151	120	Stat Max	D	A	G	
U.S. v. Bowie, 2006 WL 2258972 (10th Cir. 2006)	D, F	210-262	180	Stat Max	D	A	G	
U.S. v. Chavez, 187 Fed. Appx. 861 (10th Cir. 2006)	O	0-6	0	W	D	A	G	
U.S. v. Gillespie, 452 F.3d 1183 (10th Cir. 2006)	O		468	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sagaste-Cruz, 187 Fed. Appx. 804 (10th Cir. 2006)	D, F	Life	Life	W	D	A	G	
U.S. v. Hernandez-Juarez, 185 Fed. Appx. 758 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Mendoza-Guardiola, 184 Fed. Appx. 791 (10th Cir. 2006)	I		24	W	D	A	G	
U.S. v. Loza, 184 Fed. Appx. 772 (10th Cir. 2006)	D, F	78-97	78	W	D	A	G	
U.S. v. Reyes-Soto, 18 Fed. App. 777 (10th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Serna-Gomez, 184 Fed. Appx. 768 (10th Cir. 2006)	I	70-87	70	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Delgado-Lucio, 184 Fed. Appx. 737 (10th Cir. 2006)	I	37-46	37	W	D	A	G	
U.S. v. Keeble, 184 Fed. Appx. 756 (10th Cir. 2006)	F	92-115	115	W	D	A	G	
U.S. v. Ramirez-Munoz, 184 Fed. Appx. 741 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Johnson, 184 Fed. Appx. 746 (10th Cir. 2006)	D	41-51	46	W	D	A	G	
U.S. v. Jardine, 184 Fed. Appx. 728 (10th Cir. 2006)	F		108	W	D	A	G	
U.S. v. Aguilar-Duenas, 184 Fed. Appx. 685 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Thomas, 183 Fed. Appx. 742 (10th Cir. 2006)	D	151-188	151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vences-Flores, 177 Fed. Appx. 791 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Lopez-Flores, 444 F.3d 1218 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Orozco-Sanchez, 2006 WL 991109 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Bodenheimer, 175 Fed. Appx. 978 (10th Cir. 2006)	S		33	W	D	A	G	
U.S. v. Rodriguez-Rojo, 175 Fed. Appx. 982 (10th Cir. 2006)	I	24-30	24	W	D	A	G	
U.S. v. Torres, 176 Fed. Appx. 915 (10th Cir. 2006)	D	210-262	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Salome-Gonzales, 174 Fed. Appx. 438 (10th Cir. 2006)	D	70-87	70	W	D	A	G	
U.S. v. Rodriguez-Quintanilla, 442 F.3d 1254 (10th Cir. 2006)	O			W	D	A	G	
U.S. v. Marquez-Olivas, 172 Fed. Appx. 855 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Mares, 441 F.3d 1152 (10th Cir. 2006)	D	51-63	51	W	D	A	G	
U.S. v. Ramos-Perez, 171 Fed. Appx. 727 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Galarza-Payan, 441 F.3d 885 (10th Cir. 2006)	I	57-71	57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Johnson, 169 Fed. Appx. 510 (10th Cir. 2006)	T		41	W	D	A	G	
U.S. v. Pina-Nunez, 167 Fed. Appx. 66 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Hernandez-Rodriguez, 167 Fed. Appx. 56 (10th Cir. 2006)	I	70-87	70	W	D	A	G	
U.S. v. Hughes, 167 Fed. Appx. 59 (10th Cir. 2006)	O	15-21	15	W	D	A	G	
U.S. v. Davis, 437 F.3d 989 (10th Cir. 2006)	F, O	360-life	360	W	D	A	G	
U.S. v. Tapia-Carrasco, 165 Fed. Appx. 685 (10th Cir. 2006)	D	41-51	46	W	D	A	G	
U.S. v. Medrano, 164 Fed. Appx. 737 (10th Cir. 2006)	D	97-121	97	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Reyes-Armendariz, 163 Fed. Appx. 688 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Rockey, 449 F.3d 1099 (10th Cir. 2006)	D		322	W	D	A	G	
U.S. v. Rosales-Trujillo, 180 Fed. Appx. 835 (10th Cir. 2006)	I	77-96	77	W	D	A	G	
U.S. v. Salazar-Alpizar, 182 Fed. Appx. 757 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Flores-Perez, 180 Fed. Appx. 823 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Vaca-Perez, 180 Fed. Appx. 779 (10th Cir. 2006)	I	41-51	41	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dixon, 179 Fed. Appx. 541 (10th Cir. 2006)	D	188-235	204	W	D	A	G	
U.S. v. Madrid, 178 Fed. Appx. 823 (10th Cir. 2006)	D	121-151	135	W	D	A	G	
U.S. v. Hernandez-Arango, 177 Fed. Appx. 848 (10th Cir. 2006)	I	30-37	33	W	D	A	G	
U.S. v. Oldham, 177 Fed. Appx. 842 (10th Cir. 2006)	S	135-168	135	W	D	A	G	
U.S. v. Gutierrez-Ayala, 179 Fed. Appx. 464 (10th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Salgado-Hernandez, 179 Fed. Appx. 481 (10th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Gomez-Castillo, 179 Fed. Appx. 484 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Perea-Gonzales, 179 Fed. Appx. 474 (10th Cir. 2006)	I	92-115	92	W	D	A	G	
U.S. v. Obando-Landa, 179 Fed. Appx. 477 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Sanchez-Valdez, 179 Fed. Appx. 449 (10th Cir. 2006)	I		42	W	D	A	G	
U.S. v. Somerville, 179 Fed. Appx. 460 (10th Cir. 2006)	D	324-405	324	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Murriega-Santos, 2006 WL 3291683 (10th Cir. 2006)	I	30-37	30	W	D	A	G	
U.S. v. Archuleta, 2006 WL 2963279 (10th Cir. 2006)	T	151-188	188	W	D	A	G	
U.S. v. Ochoa-Villarruel, 2006 WL 2868246 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Flores, 2006 WL 2774035 (10th Cir. 2006)	D		71	W	D	A	G	
U.S. v. Brereton, 2006 WL 2678029 (10th Cir. 2006)	O	12-18	12	W	D	A	G	
U.S. v. Perez-Elvira, 2006 WL 2640527 (10th Cir. 2006)	I	15-21	18	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ochoa-Birueta, 2006 WL 2338071 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Tellez-Acosta, 183 Fed. Appx. 780 (10th Cir. 2006)	I		46	W	D	A	G	
U.S. v. Yelloweagle, 181 Fed. Appx. 734 (10th Cir. 2006)	S		12	W	D	A	G	
U.S. v. Wortman, 182 Fed. Appx. 755 (10th Cir. 2006)	O	3-9	6	W	D	A	G	
U.S. v. Machuca, 172 Fed. Appx. 902 (10th Cir. 2006)	D	84-105	84	W	D	A	G	
U.S. v. Boyd, 172 Fed. Appx. 841 (10th Cir. 2006)	F	151-188	151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Demeulenaere, 2006 WL 3238102 (10th Cir. 2006)	D		68	W	D	A	G	
U.S. v. Segovia-Torres, 2006 WL 3222260 (10th Cir. 2006)	I	63-78	63	W	D	A	G	
U.S. v. Miller, 2006 WL 3117912 (10th Cir. 2006)	D	110-137	120	W	D	A	G	
U.S. v. Padilla, 2006 WL 3095836 (10th Cir. 2006)	D	70-87	76	W	D	A	G	
U.S. v. Molina-Rascon, 2006 WL 3086714 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Wilson, 2006 WL 3072766 (10th Cir. 2006)	F	70-87	70	W	D	A	G	
U.S. v. Wade, 2006 WL 3059929 (10th Cir. 2006)	O		100	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Clark, 2006 WL 2963958 (10th Cir. 2006)	O	150-157	150	W	D	A	G	
U.S. v. Munoz-Ortiz, 2006 WL 2925296 (10th Cir. 2006)	I	37-46	37	W	D	A	G	
U.S. v. Gutierrez-Palma, 2006 WL 2925293 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Howell, 2006 WL 2868241 (10th Cir. 2006)	D, F	188-235	189	W	D	A	G	
U.S. v. McDonald, 2006 WL 2868231 (10th Cir. 2006)	T		71	W	D	A	G	
U.S. v. Nava-Zamora, 2006 WL 2848085 (10th Cir. 2006)	I	27-33	27	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Perkins, 2006 WL 2811295 (10th Cir. 2006)	F	70-87	70	W	D	A	G	
U.S. v. Caballero-Robles, 2006 WL 2811293 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Velasquez, 2006 WL 2811299 (10th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Martinez-Jimenez, 464 F.3d 1205 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Kostich, 2006 WL 2709665 (10th Cir. 2006)	O	51-63	63	W	D	A	G	
U.S. v. Herula, 464 F.3d 1132 (10th Cir. 2006)	T	188-235	188	W	D	A	G	
U.S. v. Leiker, 2006 WL 2522494 (10th Cir. 2006)	D	235-293	240	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ramirez-Jimenez, 2006 WL 2522484 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Perez-Lopez, 2006 WL 2501422 (10th Cir. 2006)	I	57-71	60	W	D	A	G	
U.S. v. Branson, 463 F.3d 1110 (10th Cir. 2006)	S	51-	51	W	D	A	G	
U.S. v. Torres-Duenas, 461 F.3d 1178 (10th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Knox, 2006 WL 2441495 (10th Cir. 2006)	D			W	D	A	G	
U.S. v. Paredes, 461 F.3d 1190 (10th Cir. 2006)	T	37-46	37	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lopez-Vasquez, 2006 WL 2391679 (10th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. McCullough, 457 F.3d 1150 (10th Cir. 2006)	D		380	W	D	A	G	
U.S. v. Herrera-Vasquez, 2006 WL 2277955 (10th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Cordova-Arevalo, 456 F.3d 1229 (10th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Soto-Soto, 2006 WL 2212080 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Anderson, 2006 WL 2213077 (10th Cir. 2006)	D		113	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Lopez-Camas, 2006 WL 2171491 (10th Cir. 2006)	I	57-71	57	W	D	A	G	
U.S. v. Garcia, 2006 WL 2076799 (10th Cir. 2006)	F	77-96	77	W	D	A	G	
U.S. v. Davis, 2006 WL 2076803 (10th Cir. 2006)	F	57-71	57	W	D	A	G	
U.S. v. Martinez, 455 F.3d 1127 (10th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Osborne, 2006 WL 2065177 (10th Cir. 2006)	F	15-21	15	W	D	A	G	
U.S. v. Lefebvre, 189 Fed. Appx. 767 (10th Cir. 2006)	T	210-262	240	W	D	A	G	
U.S. v. Bustamante, 454 F.3d 1200 (10th Cir. 2006)	D	70-87	78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Christiansen, 188 Fed. Appx. 767 (10th Cir. 2006)	O	151-188	180	W	D	A	G	
U.S. v. Vaca-Perez, 178 Fed. Appx. 841 (10th Cir. 2006)	I	30-37	30	W	D	R	D	P
U.S. v. Sanchez-Juarez, 446 F.3d 1109 (10th Cir. 2006)	I	41-51	41	W	D	R	D	P
U.S. v. Serna-Valdiviezo, 2006 WL 2328745 (10th Cir. 2006)	I	46-57	57	W	D	R	D	P

ELEVENTH CIRCUIT

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rodriguez, 2006 WL 3078934 (11th Cir. 2006)	I	57-71	120	A	D	A	G	
U.S. v. Wesley, 2006 WL 2924070 (11th Cir. 2006)	D	5-11	36	A	D	A	G	
U.S. v. Herrin, 2006 WL 2873201 (11th Cir. 2006)	T, D	6-12	24	A	D	A	G	
U.S. v. Matthews, 2006 WL 2789850 (11th Cir. 2006)	F	92-115	120	A	D	A	G	
U.S. v. Reddick, 2006 WL 1683461 (11th Cir. 2006)	T	110-137	240	A	D	A	G	
U.S. v. Valnor, 451 F.3d 744 (11th Cir. 2006)	T, O	15-21	28	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ford, 2006 WL 1490159 (11th Cir. 2006)	D	5-11	24	A	D	A	G	
U.S. v. Hughes, 2006 WL 1308564 (11th Cir. 2006)	I	33-41	60	A	D	A	G	
U.S. v. Perkins, 2006 WL 1228722 (11th Cir. 2006)	T, O	41-51	96	A	D	A	G	
U.S. v. Hutchinson, 2006 WL 1217876 (11th Cir. 2006)	F, T	8-14	36	A	D	A	G	
U.S. v. Dass, 2006 WL 1159052 (11th Cir. 2006)	F	46-57	72	A	D	A	G	
U.S. v. Eldick, 443 F.3d 783 (11th Cir. 2006)	D, T	87-108	180	A	D	A	G	
U.S. v. Reeves, 2006 WL 684476 (11th Cir. 2006)	T, O	15-21	60	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Germany, 2006 WL 940665 (11th Cir. 2006)	T, F		58	A	D	A	G	
U.S. v. Hardy, 2006 WL 1374500 (11th Cir. 2006)	D	5-11	24	A	D	A	G	
U.S. v. Moore, 443 F.3d 790 (11th Cir. 2006)	D	3-9	18	A	D	A	G	
U.S. v. O'Rourke, 2006 WL 2567600 (11th Cir. 2006)	T	33-41	60	A	D	A	G	
U.S. v. Jose, 2006 WL 2329361 (11th Cir. 2006)	D	60-71	80	A	D	A	G	
U.S. v. Irizarry, 458 F.3d 1208 (11th Cir. 2006)	O	41-51	60	A	D	A	G	
U.S. v. Square, 2006 WL 2243020 (11th Cir. 2006)	D, F	37-46	51	A	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hendricks, 2006 WL 1914599 (11th Cir. 2006)	T	10-16	30	A	D	A	G	
U.S. v. Pugh, 2006 WL 27270 (11th Cir. 2006)	F		210	A	D	A	G	
U.S. v. Chacon-Blanco, 2006 WL 2400942 (11th Cir. 2006)	D	3-9	24	A	D	A	G	
U.S. v. Perkins, 2006 WL 1716053 (11th Cir. 2006)	T	37-46	27	B	D	A	G	
U.S. v. Taylor, 2006 WL 1697177 (11th Cir. 2006)	D	life	360	B	D	A	G	
U.S. v. Luna-Mora, 2006 WL 1236788 (11th Cir. 2006)	I	12-18	8	B	D	A	G	
U.S. v. Martin, 2006 WL 1130764 (11th Cir. 2006)	D	151-188	120	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Johnson, 2006 WL 839077 (11th Cir. 2006)	D	151-188	96	B	D	A	G	
U.S. v. Hill, 2006 WL 648019 (11th Cir. 2006)	D	292-365	250	B	D	A	G	
U.S. v. Sweeting, 437 F.3d 1105 (11th Cir. 2006)	D	33-41	24	B	D	A	G	
U.S. v. Hickman, 2006 WL 988466 (11th Cir. 2006)	D	188-235	150	B	D	A	G	
U.S. v. Smith, 2006 WL 1410053 (11th Cir. 2006)	T, O	life (300)	27	B	D	A	G	
U.S. v. Pitts, 2006 WL 2052728 (11th Cir. 2006)	D	360-life	300	B	D	A	G	
U.S. v. Lewis, 2006 WL 2011502 (11th Cir. 2006)	D	262-327	210	B	D	A	G	
U.S. v. Wilks, 464 F.3d 1240 (11th Cir. 2006)	D	262-367	212	B	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Thompson, 2006 WL 1889745 (11th Cir. 2006)	D	360-life	240	B	D	A	G	
U.S. v. Harrison, 2006 WL 1881439 (11th Cir. 2006)	D		90	B	D	A	G	
U.S. v. Owens, 464 F.3d 1252 (11th Cir. 2006)	T, O		60	B	D	A	G	
U.S. v. Morales, 2006 WL 940643 (11th Cir. 2006)	D	188-235	141	B	D	A	G	
U.S. v. Mathis, 2006 WL 2087568 (11th Cir. 2006)	O	57-71	36	B	D, G	A		
U.S. v. Gray, 453 F.3rd 1323 (11th Cir. 2006)	S	151-188	72	B	G	A	D	
U.S. v. Halsema, 2006 WL 1229005 (11th Cir. 2006)	S	57-71	24	B	G	A	D	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vawter, 2006 WL 325745 (11th Cir. 2006)	T	24-30	6	B	G	A	D	
U.S. v. Montgomery, 2006 WL 284205 (11th Cir. 2006)	T		8	B	G	A	D	
U.S. v. Williams, 456 F.3d 1353 (11th Cir. 2006)	D	360-life	204	B	G	R	G	S
U.S. v. Arevalo-Juarez, 464 F.3d 1246 (11th Cir. 2006)	I	46-57	30	B	G	R	G	S
U.S. v. Martin, 455 F.3d 1227 (11th Cir. 2006)	T, O	108-135	7 days	B	G	R	G	S
U.S. v. Crisp, 454 F.3d 1285 (11th Cir. 2006)	T, O	6-12	5 hours	B	G	R	G	S
U.S. v. Soto, 2006 WL 3327649 (11th Cir. 2006)	F	60	9	B	G	R	G	S

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Alexander, 2006 WL 2591877 (11th Cir. 2006)	F	135-168	180	mand. Min.	D	A	G	
U.S. v. Luong, 2006 WL 760264 (11th Cir. 2006)	T		136	W	D	A	G	
U.S. v. Valladares, 2006 WL 176936 (11th Cir. 2006)	D	235-293	240	W	D	A	G	
U.S. v. Cifuentes-Prado, 2006 WL 167453 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Jones, 2006 WL 3285272 (11th Cir. 2006)	D, F	46-57	46	W	D	A	G	
U.S. v. Hickson, 2006 WL 3208680 (11th Cir. 2006)	D, F	57-71	57	W	D	A	G	
U.S. v. Henry, 2006 WL 3228402 (11th Cir. 2006)	T	21-27	24	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Small, 2006 WL 3231277 (11th Cir. 2006)	F		151	W	D	A	G	
U.S. v. Baptiste, 2006 WL 3147302 (11th Cir. 2006)	O		9	W	D	A	G	
U.S. v. Martin, 2006 WL 3203937 (11th Cir. 2006)	D, F	188-235	229	W	D	A	G	
U.S. v. Gordon, 2006 WL 3147287 (11th Cir. 2006)	D, F			W	D	A	G	
U.S. v. Smith 2006 WL 3102314 (11th Cir. 2006)	D, F		90	W	D	A	G	
U.S. v. Campaz, 2006 WL 3090546 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Gaddis, 2006 WL 3090139 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. DeAngelis, 2006 WL 3082674 (11th Cir. 2006)	T, O	292-365	300	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vargas-Medina, 2006 WL 3084287 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Tiu, 2006 WL 3044407 (11th Cir. 2006)	I	57-61	57	W	D	A	G	
U.S. v. Aguirre, 2006 WL 3024708 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Harrington, 2006 WL 3024706 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Casanova, 2006 WL 2990089 (11th Cir. 2006)	D	324-405	324	W	D	A	G	
U.S. v. Vargas, 2006 WL 2990091 (11th Cir. 2006)	I	8-14	12	W	D	A	G	
U.S. v. Allowitz, 2006 WL 2952740 (11th Cir. 2006)	O	121-151	151	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Santiago, 2006 WL 2946882 (11th Cir. 2006)	I	15-21	21	W	D	A	G	
U.S. v. Whelan, 2005 WL 2927353 (11th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Williams, 2006 WL 2877901 (11th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Herrera-Aguilar, 2006 WL 2789847 (11th Cir. 2006)	D	292-365	292	W	D	A	G	
U.S. v. Maysonet, 2006 WL 2769414 (11th Cir. 2006)	F	188-235	188	W	D	A	G	
U.S. v. Moreno, 2006 WL 2826937 (11th Cir. 2006)	D	135-168	144	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 2006 WL 2817541 (11th Cir. 2006)	D	70-87	78	W	D	A	G	
U.S. v. Johnson, 2006 WL 2805652 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Motes, 2006 WL 2769576 (11th Cir. 2006)	F	30-37	30	W	D	A	G	
U.S. v. Soliman, 2006 WL 1813902 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Abusaid, Jr., 2006 WL 1824025 (11th Cir. 2006)	D, F	97-124	97	W	D	A	G	
U.S. v. Turner, 2006 WL 1785125 (11th Cir. 2006)	S		360	W	D	A	G	
U.S. v. Gonzalez, 2006 WL 1761082 (11th Cir. 2006)	I	6-12	12	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Diaz, 2006 WL 1746891 (11th Cir. 2006)	D		188	W	D	A	G	
U.S. v. Brown, 2006 WL 1746932 (11th Cir. 2006)	T	84-105	105	W	D	A	G	
U.S. v. Perkins, WL 1716053 (11th Cir. 2006)	T	37-46	46	W	D	A	G	
U.S. v. Arredondo, 2006 WL 1697130 (11th Cir. 2006)	D		121	W	D	A	G	
U.S. v. Hernandez, 2006 WL 1674270 (11th Cir. 2006)	D		60	W	D	A	G	
U.S. v. Portocabrero, 2006 WL 1674321 (11th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Holmes, 2006 WL 1674320 (11th Cir. 2006)	F		57	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Dowd, 451 F.3d 1244 (11th Cir. 2006)	T, F	188-235	221	W	D	A	G	
U.S. v. Johnson, 451 F.3d 1239 (11th Cir. 2006)	S	life	1680	W	D	A	G	
U.S. v. Ortiz-Castro, 2006 WL 1519974 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Godinez-Santos, 2006 WL 1490119 (11th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Allen, 2006 WL 1410122 (11th Cir. 2006)	D	262-327	327	W	D	A	G	
U.S. v. Ruben, 2006 WL 1388736 (11th Cir. 2006)	T	41-51	48	W	D	A	G	
U.S. v. Portocarrero, 2006 WL 1342655 (11th Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ortiz-Delgado, 451 F.3d 752 (11th Cir. 2006)	S	57-71	60	W	D	A	G	
U.S. v. Rolle, 2006 WL 1582189 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Umbacia, 2006 WL 1582062 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Santacruz, 2006 WL 1559770 (11th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Velasquez, 2006 WL 1582190 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Bent, 2006 WL 1582191 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Sprague, 2006 WL 1675936 (11th Cir. 2006)	T		33	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Garcia-Delgado, 2006 WL 1626935 (11th Cir. 2006)	I	46-57	51	W	D	A	G	
U.S. v. Joseph, 2006 WL 1626928 (11th Cir. 2006)	I	46-57	46	W	D	A	G	
U.S. v. Laster, 2006 WL 1626972 (11th Cir. 2006)	F	84-105	96	W	D	A	G	
U.S. v. Hernandez, 2006 WL 1697526 (11th Cir. 2006)	I	77-96	80	W	D	A	G	
U.S. v. Vela, 2006 WL 1737387 (11th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Ludovico, 2006 WL 1342832 (11th Cir. 2006)	F, T		78	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. McElroy, 2006 WL 1228707 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Plata-Mora, 2006 WL 1217877 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Ramirez-Gutierrez, 2006 WL 1217878 (11th Cir. 2006)	I	51-63	60	W	D	A	G	
U.S. v. Vente, 2006 WL 1217875 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Polchantara, 2006 WL 1214191 (11th Cir. 2006)	S	33-41	33	W	D	A	G	
U.S. v. Armas, 2006 WL 1217871 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mandhal, 2006 WL 1168806 (11th Cir. 2006)	O		168	W	D	A	G	
U.S. v. Patel, 2006 WL 1130866 (11th Cir. 2006)	T	33-41	48	W	D	A	G	
U.S. v. Thomas, 446 F.3d 1348 (11th Cir. 2006)	T, O	121-151	121	W	D	A	G	
U.S. v. Angulo Hernandez, 2006 WL 994076 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Giraldo, 2006 WL 988709 (11th Cir. 2006)	D	57-71	57	W	D	A	G	
U.S. v. Stumpner, 2006 WL 869611 (11th Cir. 2006)	D, F		292	W	D	A	G	
U.S. v. Moore, 2006 WL 887742 (11th Cir. 2006)	F	210-262	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Sinisterra-Garcia, 2006 WL 826071 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Lee, 2006 WL 771179 (11th Cir. 2006)	D		360	W	D	A	G	
U.S. v. Garrett, 2006 WL 770645 (11th Cir. 2006)	T, F, O	92-115	92	W	D	A	G	
U.S. v. Flores, WL 2006 891033 (11th Cir. 2006)	D	292-365	292	W	D	A	G	
U.S. v. Colorado, 2006 WL 622740 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Cruz, 2006 WL 620539 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Tapias-Vera, 2006 WL 620618 (11th Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Garcia, 2006 WL 584342 (11th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Garcia, 2006 WL 584342 (11th Cir. 2006)	D	324-405	328	W	D	A	G	
U.S. v. Garcia, 2006 WL 584342 (11th Cir. 2006)	D	292-365	328	W	D	A	G	
U.S. v. Daniels, 2006 WL 542560 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Berrio, 2006 WL 467991 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Williams, 2006 WL 463203 (11th Cir. 2006)	T, O	92-115	92	W	D	A	G	
U.S. v. Armas, 2006 WL 1217871 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Esperance, 2006 WL 250782 (11th Cir. 2006)	D	151-188	151	W	D	A	G	
U.S. v. Hutchins, 2006 WL 1159388 (11th Cir. 2006)	O		63	W	D	A	G	
U.S. v. Oduardo, 2006 WL 231645 (11th Cir. 2006)	D, F		210	W	D	A	G	
U.S. v. Valentierra-Sanchez, 2006 WL 167455 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Love, 2006 WL 133414 (11th Cir. 2006)	S	70-87	70	W	D	A	G	
U.S. v. Baez-Berrios, 2006 WL 139198 (11th Cir. 2006)	I		46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Perlaza, 2006 WL 707130 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Murillo-Moya, 2006 WL 688963 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Abram, 2006 WL 690850 (11th Cir. 2006)	T, F		188	W	D	A	G	
U.S. v. Harden, 2006 WL 690850 (11th Cir. 2006)	T, F		648	W	D	A	G	
U.S. v. Valdez, 2006 WL 648012 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Gomez-Lopez, 2006 WL 1004860 (11th Cir. 2006)	I	41-51	46	W	D	A	G	
U.S. v. Sanders, 2006 WL 1008383 (11th Cir. 2006)	D		324	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Stripling, 2006 WL 1071848(11th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Arboleda, 2006 WL 1168797 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Munoz-Arenas, 2006 WL 1144569 (11th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Shemesh, 2006 WL 1529078 (11th Cir. 2006)	D		78	W	D	A	G	
U.S. v. Honeycutt, 2006 WL 1428297 (11th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Pinzon, 2006 WL 1457813 (11th Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Williams, 2006 WL 1457810 945 (11th Cir. 2006)	D		248	W	D	A	G	
U.S. v. Ugarte, 2006 WL 1490125 (11th Cir. 2006)	I		27	W	D	A	G	
U.S. v. Medrano, 2006 WL 334025 (11th Cir. 2006)	D	168-210	168	W	D	A	G	
U.S. v. Ashcroft, 2006 WL 306173 (11th Cir. 2006)	F		71	W	D	A	G	
U.S. v. Lisbon, 2006 WL 306343 (11th Cir. 2006)	T, F	63-78	63	W	D	A	G	
U.S. v. Gutierrez, 2006 WL 2062132 (11th Cir. 2006)	D		24	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Pitts, 2006 WL 2052728 (11th Cir. 2006)	D	188-235	210	W	D	A	G	
U.S. v. Pitts, 2006 WL 2052728 (11th Cir. 2006)	F	60	60	W	D	A	G	
U.S. v. Morgan, 2006 WL 2033927 (11th Cir. 2006)	D		151	W	D	A	G	
U.S. v. Molden, 2006 WL 2033900 (11th Cir. 2006)	F	110-137	110	W	D	A	G	
U.S. v. Farley, Jr., 2006 WL 2012412 (11th Cir. 2006)	D	188-235	188	W	D	A	G	
U.S. v. Childs, 2006 WL 2769320 (11th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Granja-Portocarrero, 2006 WL 3253994 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Hubbard, 2006 WL 2683067 (11th Cir. 2006)	F	92-115	92	W	D	A	G	
U.S. v. Moreno, 2006 WL 3253988 (11th Cir. 2006)	D	168-210	168	W	D	A	G	
U.S. v. Hernandez-Flores, 2006 WL 3253953 (11th Cir. 2006)	I	70-87	78	W	D	A	G	
U.S. v. Wright, 2006 WL 2623280 (11th Cir. 2006)	I	57-71	60	W	D	A	G	
U.S. v. Bautista-Enamorado, 2006 WL 2640808 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Spaulding, 2006 WL 2623310 (11th Cir. 2006)	D		188	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Jimenez-Najera, 2006 WL 2613731 (11th Cir. 2006)	D		211	W	D	A	G	
U.S. v. Ramirez-Garcia, 2006 WL 2594990 (11th Cir. 2006)	D	97-121	97	W	D	A	G	
U.S. v. Selgjekaj, 2006 WL 2578691 (11th Cir. 2006)	T	41-51	41	W	D	A	G	
U.S. v. Jiminez-Galan, 2006 WL 2594986 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Diaz, 2006 WL 2577850 (11th Cir. 2006)	D	87-108	87	W	D	A	G	
U.S. v. Freeman, 2006 WL 2567232 (11th Cir. 2006)	S	70-87	75	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Carralero, 2006 WL 2571410 (11th Cir. 2006)	T, O	108-135	121	W	D	A	G	
U.S. v. Burton, 2006 WL 2570868 (11th Cir. 2006)	O	33-41	33	W	D	A	G	
U.S. v. Anderson, 2006 WL 2562093 (11th Cir. 2006)	D, F		78	W	D	A	G	
U.S. v. Bonilla, 463 F.3d 1176 (11th Cir. 2006)	D	108-135	108	W	D	A	G	
U.S. v. Hincapie, 2006 WL 2480445 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Archibald, 2006 WL 2442034 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Beverly, 2006 WL 2442039 (11th Cir. 2006)	F	210-262	210	W	D	A	G	
U.S. v. Ortega-Correra, 2006 WL 2429999 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Pope, 461 F.3d 1331 (11th Cir. 2006)	D	262-327	262	W	D	A	G	
U.S. v. Urena, 2006 WL 2400940 (11th Cir. 2006)	D		210	W	D	A	G	
U.S. v. Castro, 2006 WL 2356150 (11th Cir. 2006)	D		87	W	D	A	G	
U.S. v. Jimerson, 2006 WL 2272173 (11th Cir. 2006)	D		20	W	D	A	G	
U.S. v. Perez-Colona, 2006 WL 22557926 (11th Cir. 2006)	I	46-57	46	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Ibarra, 2006 WL 2220550 (11th Cir. 2006)	D	70-87	70	W	D	A	G	
U.S. v. Duffis, 2006 WL 2129764 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Espinoza, 2006 WL 1995715 (11th Cir. 2006)	I	8-14	10	W	D	A	G	
U.S. v. Avila, 2006 WL 1982628 (11th Cir. 2006)	D		262 -	W	D	A	G	
U.S. v. Taylor, 2006 WL 1995608 (11th Cir. 2006)	F	210-262	210	W	D	A	G	
U.S. v. Castro, 455 F.3d 1249 (11th Cir. 2006)	I	41-51	41	W	D	A	G	
U.S. v. Barker, 2006 WL 1889775 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Ellwood, 2006 WL 1913366 (11th Cir. 2006)	D		360	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Velasquez-Cabrere, 2006 WL 1882684 (11th Cir. 2006)	I	46-51	46	W	D	A	G	
U.S. v. Aguilar, 2006 WL 1876670 (11th Cir. 2006)	I	60	60	W	D	A	G	
U.S. v. Martinez, 434 F.3d 1318 (11th Cir. 2006)	I	77-96	87	W	D	A	G	
U.S. v. Clark, 2006 WL 44209 (11th Cir. 2006)	T, F	60	60	W	D	A	G	
U.S. v. Clark, 2006 WL 44209 (11th Cir. 2006)	T, F	262-327	300	W	D	A	G	
U.S. v. Balereso, 2006 WL 16290 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Clark, 2006 Wl 12969 (11th Cir. 2006)	D	195-228	195	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Montelongo, 2006 WL 3326749 (11th Cir. 2006)	I	46-57	50	W	D	A	G	
U.S. v. McIntosh, 2006 WL 3084651 (11th Cir. 2006)	D	360-life	360	W	D	A	G	
U.S. v. Dalimonte, 2006 WL 1913365 (11th Cir. 2006)	S		27 + lifetime supervised release	W	D	A	G	
U.S. v. Maddox, 2006 WL 2012214 (11th Cir. 2006)	F	77-96	84	W	D	A	G	
U.S. v. Munoz, 2006 WL 2075686 (11th Cir. 2006)	D	135-168	135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Mitsven, 452 F.3d 1264 (11th Cir. 2006)	D	21-27	4 + 36 supervised release	W	D	A	G	
U.S. v. Paredes, 2006 WL 2189573 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Hoss, 2006 WL 2270924 (11th Cir. 2006)	S	210-262	262	W	D	A	G	
U.S. v. Brown, 2006 WL 2372160 (11th Cir. 2006)	D	63-78	75	W	D	A	G	
U.S. v. Penaloza-Vallejo, 2006 WL 2561841 (11th Cir. 2006)	I		57	W	D	A	G	
U.S. v. Hamilton, 2006 WL 2613737 (11th Cir. 2006)	D	188-235	200	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Parra-Chavez, 2006 WL 2805649 (11th Cir. 2006)	D	235-293	235	W	D	A	G	
U.S. v. Delacruz, 2006 WL 2864617 (11th Cir. 2006)	I	77-96	96	W	D	A	G	
U.S. v. Organes-Gandavilla, 2006 WL 2946871 (11th Cir. 2006)	D		228	W	D	A	G	
U.S. v. De La Rosa-Padilla, 2006 WL 2946867 (11th Cir. 2006)	D		168	W	D	A	G	
U.S. v. Barrios, 2006 WL 2971322 (11th Cir. 2006)	D		135	W	D	A	G	
U.S. v. Moody, 2006 WL 2990087 (11th Cir. 2006)	D	210-262	210	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Winters, 2006 WL 759256 (11th Cir. 2006)	D	151-188	188	W	D	A	G	
U.S. v. Ugarte, 2006 WL 1490125 (11th Cir. 2006)	D		33	W	D	A	G	
U.S. v. Coffindaffer, 2006 WL 3257879 (11th Cir. 2006)	D	168-210	180	W	D	R	D	P
U.S. v. Romero, 2006 WL 1785290 (11th Cir. 2006)	D	70-87	87	W	D	A	G	
U.S. v. Hurtado-Olmedo, 2006 WL 172221 (11th Cir. 2006)	D	135-168	135	W	D	A	G	
U.S. v. Hickson, 2006 WL 3208680 (11th Cir. 2006)	F		60	W	D	A	G	
U.S. v. Estupinan, 2006 WL 1813893 (11th Cir. 2006)	D		135	W	D	A	G	

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Rivera, 2006 WL 1582186 (11th Cir. 2006)	I		18	W	D	A	G	
U.S. v. Serna-Flores, 2006 WL 887315 (11th Cir. 2006)	F, I		30	W	D	A	G	
U.S. v. Lockhart, 2006 WL 318765 (11th Cir. 2006)	T, O		30	W	D	A	G	
U.S. v. Rios, 2006 WL 306408 (11th Cir. 2006)	I		77	W	D	A	G	
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U.S. v. Holt, 2006 WL 27271 (11th Cir. 2006)	T		18	W	D	A	G	

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Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Coumaris, 2006 WL 2828872 (D.C. Cir. 2006)				W	D	A	G	
U.S. v. Dorcely, 455 F.3d 336 (D.C. Cir. 2006)	T	24-30	24	W	D	A	G	
U.S. v. Gillespie, 436 F.3d 272 (D.C. Cir. 2006)	F	41-51	41	W	D	A	G	

VACATED PANEL DECISIONS TO BE REHEARD EN BANC

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Vonner, 452 F.3d 560 (6th Cir.), *vacated by* 2006 U.S. App. LEXIS 27661 (Oct. 12, 2006)	D	108 - 135	117	W	D	R	D	P
U.S. v. Zavala, 443 F.3d 1165 (9th Cir.), *vacated by* 2006 U.S. App. LEXIS 21490 (Aug. 23, 2006)	D	life	360	B	D	R	D	P
U.S. v. Carty, 453 F.3d 1214 (9th Cir.), *vacated by* 2006 U.S. App. LEXIS 21490 (Aug. 23, 2006)	S		235	W	D	R	D	P

Case Name/Citation	Type of Crime	Guide-line Range	Sentence	Within Above Below	App.: Gov't Def't	Rev'd Aff'd	Who Won? Gov't/ Def't	If Rev'd: Procd/ Subst
U.S. v. Burns, 438 F.3d 826 (8th Cir.), *vacated by* 2006 U.S. App. LEXIS 12239 (May 18, 2006)	D	360-life	144	B	G	A	D	

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Supreme Court, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

(3)

No. 06-5618

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MARIO CLAIBORNE,
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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Sentencing Project and the American Civil Liberties Union respectfully submit this brief *amici curiae* in support of the petitioner in this case.[1]

INTEREST OF *AMICI CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on

[1] Pursuant to Rule 37, a blanket letter of consent from the petitioner has been filed with the Clerk of the Court. A letter of consent from the respondent United States authorizing the filing of this brief is also on file with the Clerk. Pursuant to Rule 36, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief.

issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies like those at issue in these cases, and promotes cost-effective and humane responses to crime. The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and a number of professional audiences.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Like the United States Sentencing Commission, the ACLU has long taken the position that the crack/cocaine sentencing disparity is irrational in design and discriminatory in effect. This case illustrates that problem and thus raises issues of significant concern to the ACLU and its members.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals violates *Booker v. United States*, 543 U.S. 220, 259 (2005), by requiring district courts to presume that sentences imposed within the ranges identified by the United States Sentences Guidelines ("the Guidelines") are reasonable and by requiring district courts to identify extraordinary circumstances in order to justify significant variances from those ranges. The decision recreates the pre-*Booker* federal sentencing regime, under which district courts were required to select a Guidelines-range sentence in the vast majority of cases.

The district court, by contrast, engaged in precisely the kind of individualized sentencing analysis a faithful reading of *Booker* not only permits, but requires. The district court correctly calculated the Guidelines range and considered that range before ultimately deciding, for a variety of reasons, to

impose a sentence below that range. The sentence it imposed was reasonable under *Booker*.

Although we agree with petitioner that the district court's sentence could be justified solely by reference to the § 3553(a) factors a district court is required to consider in *any* case, we write separately to explain why the district court's sentence is particularly reasonable because this is not just any case. It is instead a case involving a first-time, non-violent, and low-level crack cocaine defendant. Long before *Booker*, courts, commentators, and even the United States Sentencing Commission ("Commission" or "U.S.S.C.") recognized that federal drug laws impose disproportionately harsh—and, ultimately, misguided—sentences on a defendant like Mr. Claiborne.

Since 1986, various federal sentencing schemes have imposed a 100:1 "weight ratio" between powder cocaine and crack cocaine. Whatever the original purpose of that ratio, it has resulted, two decades later, in thousands of crack cocaine sentences which are *far* "greater than necessary" to satisfy § 3553(a)'s factors. These lengthy sentences have had a devastating impact on first-time and non-violent offenders, as well as on low-income urban areas, including predominantly African-American communities, in which these offenders live. The consequences of the 100:1 disparity are so ruinous that commentators have labeled the crack-powder disparity the modern-day Jim Crow law.

The disparity has also undermined rather than promoted federal drug-policy goals. The disparity means that first-time and non-violent crack defendants serve longer prison sentences than high-level importers and suppliers of the powder cocaine required to produce crack cocaine. It has also led federal law enforcement officials to investigate and prosecute low-level intrastate crack cases rather than solving sophisticated interstate drug operations. That distorted emphasis also has come at the expense of the states, only *one*

of which (Iowa) agrees with a 100:1 weight ratio in sentencing crack defendants.

It is therefore unsurprising, following *Booker*, that a district court facing an offender and an offense like this one, might, after *properly* weighing all of the § 3553(a) factors, impose a sentence below the Guidelines range. Several district courts, based on their experience with the Guidelines and crack cocaine defendants, have exercised their authority under *Booker* to impose below-Guidelines range sentences in crack cocaine cases like this one. So long as those courts consider all of the § 3553(a) factors in imposing a sentence, they not only comply with but faithfully adopt *Booker*.

For these reasons, the district court's decision to impose a sentence below the Guidelines range was reasonable. The court of appeals' contrary decision effectively requiring Guidelines-range sentencing in the majority of cases violates the remedial holding of *Booker*. The Court should reverse.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS VIOLATES *BOOKER* BY ELEVATING THE GUIDELINES ABOVE OTHER RELEVANT SENTENCING FACTORS.

A. District Courts Should Rely On The Guidelines Range Only As One Of Many Co-Equal Factors.

1. This Court made clear in *Booker* that a district court's authority to impose a sentence does not begin and end with the range prescribed by the Guidelines. On the contrary, the Court concluded that it was precisely the fact that the Guidelines ranges were mandatory, although subject to departures, that rendered them invalid. *See Booker*, 543 U.S. at 234. Following *Booker*, district courts must consult the Guidelines, but they must also consider *other* factors in deciding the appropriate sentence. *See Booker*, 543 U.S. at 259 (judges must "take account of the Guidelines together

with other sentencing goals" (citing 18 U.S.C. § 3553(a) (Supp. 2004)). These other factors include, although not exhaustively, the seriousness of the offense, the need for deterrence, and the history and characteristics of the defendant. *See Booker*, 543 U.S. at 268-69 (citing § 3553(a)).[2] After considering all of the pertinent factors, district courts must impose a sentence which is "not greater than necessary" to satisfy those factors. 18 U.S.C. § 3553(a).

This shift from a single relevant consideration to a large number of factors represented a watershed change in sentencing practices throughout the federal system. Properly understood, *Booker* has rendered the Guidelines just that: guidelines. *See Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.")

2. The decision of the Court of Appeals, however, effectively treats the Guidelines as ongoing categorical commands rather than as one of many co-equal factors a district court must consider in imposing a sentence. The Court of Appeals held, for example, that an "extraordinary variance" from the Guidelines range could only be justified by "extraordinary circumstances"—exactly the kind of circumstances the Court in *Booker* held did *not* save the

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[2] Section 3553(a) mandates that sentencing judges "impose a sentence that is sufficient but not greater than necessary" to satisfy the needs of just punishment in light of the seriousness of the offense, deterrence, incapacitation, and rehabilitation. In selecting a particular sentence, a judge must consider: the history and characteristics of the defendant and the circumstances of the offense (including mitigating history, characteristics, and circumstances, the purposes just described, and the "kinds of sentences available" (*i.e.*, the statutory maximum and minimums if any, as opposed to the kinds of sentences recommended by the Guidelines), the Guidelines range, the policy statements, the need to avoid unwarranted disparities among defendants with similar records convicted of similar conduct (not the need to avoid sentences different from the Guidelines range), and the need to provide restitution to victims, if any.

Guidelines. *Compare* Pet. App. at 3-4, *with Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.").

The Court of Appeals also held that the district court's decision to "vary" from the Guidelines was impermissibly based in part on factors already "taken into account" by the Guidelines themselves. But the Court's decision in *Booker* clearly contemplates that district courts, after consulting the Guidelines, *may* vary from its prescribed sentencing ranges on the basis of the § 3553(a) factors, *many* of which are "taken into account," at least in part, by the Guidelines themselves. *See, e.g.*, 18 U.S.C. § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant"); *id.* § 3553(a)(2) ("the seriousness of the offense"). *Booker*'s command to treat the Guidelines as advisory necessarily entails authorizing district courts to "weigh" the § 3553(a) factors differently than the Commission itself weighed those same factors, so long as the resulting sentence is reasonable. Although the result is less uniformity than existed prior to *Booker*, uniformity must yield to the Sixth Amendment here. *See Booker*, 543 U.S. at 263 ("We cannot and do not claim that the use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure.").

3. The district court properly followed the *Booker* standard and considered not only the Guidelines range, but also the other now-relevant § 3553(a) factors as well. In selecting a sentence, the district court considered petitioner's age, his family situation and assumption of familial responsibilities, his risk of re-offending, the absence of any criminal history, the small quantity of drugs involved in his offense, and his success to date in treating his drug problem. *See* Pet. at 2-3 (quoting Sent. Tr. at 23-24). While acknowledging that the Guidelines "take into account a lot of

factors," the District Court held that the low end of the range was "excessive" in light of "the circumstances involved in this case." *Id.* (quoting Sent. Tr. at 23-24). Refusing to "throw[] [Mr. Claiborne] away" for a period exceeding three years, the district court imposed concurrent 15-month sentences and three years of supervised release with drug testing and drug counseling. *Id.* at 3 (quoting Sent. Tr. at 23-24). In sum, the district court properly consulted the Guidelines and considered all of the § 3553(a) factors in selecting a sentence. And based on its considerable experience in sentencing defendants, the district court also expressly "compare[d Claiborne's] situation to that of other individuals that I have seen in this court who have committed similar crimes . . . and the sentences that they receive[d]" in determining that the Guideline-recommended range was not "commensurate" with the facts of Mr. Claiborne's case. *Id.* (quoting Sent. Tr. at 23-24). This is exactly the kind of individualized sentencing *Booker* requires.

B. Crack Cocaine Sentences Illustrate Why The Guidelines Range May Not Be Treated As "Presumptively Reasonable" In Every Case.

Although the district court's decision in *Claiborne* would have been reasonable even if the case had not involved crack cocaine, it *did* involve crack cocaine, and that fact cements the reasonableness of the district court's sentence. Mr. Claiborne was sentenced for distributing .23 grams and possessing 5.03 grams of crack cocaine.[3] As his counsel argued at sentencing, the Guidelines reflect a 100:1 weight ratio between the quantity of powder and crack cocaine necessary to trigger an equivalent penalty. Counsel urged the district court to impose a sentence below the Guidelines based, in part, on the

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[3] As the Commission has noted, five grams of crack cocaine is an amount a crack user "might consume in a weekend." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 132 (Nov. 2004).

unreasonableness of this disparity. Although the district court did not base the sentence it imposed on this disparity, the sentence it imposed was reasonable, in part, because of the disproportionately severe penalties set by the Guidelines for crack cocaine cases. In at least some cases, if not many, the crack cocaine sentence ranges recommended by the Guidelines are not presumptively reasonable. Long before *Booker*, courts and commentators alike had acknowledged that crack sentences are often contrary to rational federal sentencing and drug policy. After *Booker*, a district court may conclude that the Guidelines produce unduly severe sentences even in cases involving low-level, non-violent, and first-time offenders.

1. Under the federal system, very small quantities of crack cocaine are treated as presumptive equivalents, for sentencing purposes, of quantities of powder cocaine 100 times larger. Under 21 U.S.C. § 841(b), for example, a 5-year mandatory minimum sentence is triggered by the possession of 5 grams of crack cocaine or by the sale of 500 grams of powder cocaine. A ten-year mandatory minimum sentence is likewise triggered by 50 grams of crack cocaine or 5,000 grams of powder cocaine. *Id.* This 100:1 weight ratio has been incorporated into the Guidelines and is used to set the Guidelines ranges. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table).

Although it is obvious that the result is dramatically longer prison sentences for crack offenders than powder cocaine offenders, the 100:1 ratio may even understate the actual disparity. On average, *low*-level crack cocaine *users* receive longer sentences than *high*-level powder cocaine importers—the very *suppliers* who provide the powder cocaine which ultimately produces crack cocaine. *See* United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 63 (May 2002) [hereinafter U.S.S.C., *2002 Report to Congress*], *available at*

http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (average sentence of lowest-level crack cocaine offenders was 104 months); *id.* at 43, 45 (average sentence of highest-level powder cocaine traffickers was 101 months). Viewed on a gram-by-gram basis, street level crack dealers are punished 300 times more severely than high level cocaine powder importers. Eric E. Sterling, *Getting Justice Off Its Junk Food Diet*, White Paper (July 17, 2006), at 4, *available at* http://www.cjpf.org/Getting_Justice_Off_Its_Junk_Food_Diet.pdf; *see also* U.S.S.C., *2002 Report to Congress*, *supra*, at 63 (104-month average sentence of lowest-level crack cocaine offenders based on average of 52 grams of crack); *id.* at 43, 45 (101-month average sentence of highest-level powder cocaine traffickers based on average of 16,000 grams of powder). Crack defendants also have the longest average period of incarceration of any drug offender—approximately 120 months. *See* United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2005), Fig. L [hereinafter "U.S.S.C., *Sourcebook*"], *available at* http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm.

In a Special Report to Congress in 1995, the Commission used the facts of an actual federal case to illustrate the impact of the 100:1 ratio in practice. In its illustration, two "crack" defendants purchased 255 grams of powder cocaine from their higher-level supplier and cooked it, yielding 88 grams of crack cocaine they intended to distribute. The higher-level "powder" supplier was subject to a Guidelines range of 33 to 41 months for selling 255 grams of power, whereas the "crack" defendants were each subject to a range of 121 to 151 months for buying a portion of the supplier's powder and cooking it. In addition, the crack defendants faced ten-year mandatory minimums, while the supplier was not subject to any mandatory minimum. *See* United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 174 (Feb. 1995) [hereinafter

"U.S.S.C., *1995 Special Report*"], *available at* http://www.ussc.gov/crack/exec.htm.

2. The 100:1 ratio is not simply a sentencing disparity problem; it is a federal drug-policy problem. Two decades of experience have shown that the 100:1 ratio has resulted in a disproportionate number of low-level offenders being prosecuted for crack offenses. In 2000, barely one in five crack cocaine defendants met the criteria of a "major" or "serious" trafficker. *See* U.S.S.C., *2002 Report to Congress*, *supra*, at 39 (noting that, in 2000, approximately 73% of convicted crack cocaine offenders were "street-level" dealers, users, and the like, while only about 21% of defendants were mid-level offenders, such as as importers, suppliers, or managers, and less than 6% were the highest-level offenders). That is simply not the result Congress had in mind in establishing the Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). In imposing mandatory minimum sentences tied to drug quantities, Congress did so specifically as part of an effort to identify, target, and punish high-level offenders. The Act was intended to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'" H.R. Rep. No. 99-845, pt. I, at 11-12 (1986); *see also* William Spade, Jr., *Beyond the 100:1 Rationale: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252-53 (1996) ("The decision to distinguish crack from powder [in the Act] coincided with the decision to punish 'serious' and 'major' traffickers more severely than others . . . . 'Serious' and 'major' drug traffickers were identified according to the amount of drugs with which they were apprehended.").[4]

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[4] A "major trafficker" is defined as someone who operates a manufacturing or distribution network, while a "serious trafficker" is defined as someone who manages "retail level traffic" in "substantial street quantities." H.R. Rep. No. 99-845, pt. I, at 1.

As we have explained, however, the prosecution of crack offenders has followed *precisely* the opposite course over time. *See* United States Sentencing Commission, Transcript of Public Hearing on Cocaine Sentencing Policy 40-41 (Nov. 14, 2006) [hereinafter "U.S.S.C., 2006 Public Hearing Tr."] (test. of Joseph Rannazzisi, Drug Enforcement Administration) (describing small-scale nature of crack cocaine operations generally and specifically noting that most operations involve only small numbers of ounces), *available at* http://www.ussc.gov/hearings/11_15_06/testimony.pdf. Crack prosecutions generally involve low-level and non-violent offenders—often first-time offenders—yet also generally result in long prison sentences.[5] These prosecutions have therefore turned federal drug policy on its head. After all, "*every* federal case against a street-level or local trafficker—who could be investigated and prosecuted by state and local law enforcement agencies—is a distraction from the critical federal role and a waste of federal resources." Sterling, *supra*, at 3. As Eric E. Sterling, former assistant counsel to the House Judiciary Committee and current President of the Criminal Justice Policy Foundation, has noted, "[t]he organizers of [the international drug trade] are virtually immune from investigation by county sheriffs, municipal police departments, or state narcotics bureaus. If the Department of Justice, the Department of Homeland Security and the Department of the Treasury are not focused

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[5] It is not uncommon today for federal law enforcement to insist that low-level suppliers convert powder cocaine into crack in order to set the stage for prosecution of cases involving potentially draconian crack sentences. *See, e.g.*, *United States v. Fontes*, 415 F.3d 174, 177-78 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant brought for sale and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [to produce an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . . .").

primarily on those international and national cases—*and they have not been*—then those cases are not being brought." *Id.* (emphasis in original).

Equally as troubling as the fact that federal prosecutors are focusing undue resources on low-level offenses is the fact that in doing so they are inappropriately federalizing what is properly the domain of the states: the prosecution of low-level and intrastate drug offenders. In doing so, they are also imposing a federal judgment that is inconsistent with that of 49 out of 50 states (as well as the District of Columbia). *See* U.S.S.C., *2002 Report to Congress*, *supra*, at 73 (noting that Iowa alone uses the same extreme 100:1 crack-powder ratio employed by the federal system and that every other state uses a lower ratio or makes no distinction between crack and powder cocaine). Indeed, the Commission found in 2002 that only 14 states maintain *any* "form of distinction between crack cocaine and powder cocaine in their penalty schemes." *Id.*[6] And even those states use considerably smaller differential ratios to distinguish between crack cocaine and powder cocaine offenders. *See id.* at 74-78 (summarizes ratios which range from 2:1 to 75:1, with most of these set at 10:1 or less and only two states greater than 50:1).[7]

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[6] South Carolina, one of the 14 states that distinguishes between crack and powder cocaine offenses, sometimes treats crack offenders more harshly than powder offenders and other times does the opposite. For example, a first-time crack cocaine offender has a higher statutory maximum penalty than a first-time powder cocaine offender, while a second-time powder cocaine offender is penalized more severely (5 to 30 years' imprisonment) than a second-time crack cocaine offender (0 to 25 years' imprisonment). *See* U.S.S.C., *2002 Report to Congress*, *supra*, at 78.

[7] Legal reform in Connecticut provides a recent example of the changes occurring at the state level. *See id.* at 73 (noting that, while the total number of states distinguishing between powder and crack cocaine did not change from 1995 to 2000, five of the states that did so in 1995 changed their practices, while five states that formerly did not do so, added

3. Disproportionate crack prison sentences have had a devastating impact not only on first-time and non-violent offenders, but on their families and communities, particularly in poor urban areas. As one commentator recently noted, the federal policy of "stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders . . . ." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center).

Tragically, a vastly disproportionate number of those incarcerated low-level drug offenders are African-American.[8] "The number of black federal crack defendants is ten times the number of white defendants." Sterling, *supra*, at 1. "In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African American." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 131 (Nov. 2004) [hereinafter "U.S.S.C., *Fifteen*

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it). Connecticut enacted legislation that eliminates the disparate treatment of crack and powder cocaine quantities for purposes of the mandatory minimum penalties that are imposed. *See* 2005 Conn. Pub. Acts 248 (Reg. Sess.); *see also* http://www.thealliancect.org/cc_sentencing.html.

[8] As of 2005, one in twelve African-American men in their late twenties was incarcerated. *See* Paige M. Harrison & Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, at 8 (2006). In addition, if current trends continue, one in three black males born today will spend some portion of his adult life incarcerated in a state or federal prison. *See* Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, Bureau of Justice Statistics, at 8 (2003). "[T]he black community as a whole suffers a comparative disadvantage when many of its young men spend their formative years behind bars . . . ." Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. Tol. L. Rev. 215, 231 (1994).

Years"], *available at* http://www.ussc.gov/15_year/15year.htm.[9] As a result, crack cocaine penalties help explain the enormous racial gap in sentences being served by black and white inmates in the federal penal system. Raising the crack cocaine threshold from 5 grams to 25 grams alone would "reduce the gap in average prison sentences between Black and White offenders by 9.2 months." *Id.* at 132. The existing problem is so severe that commentators have labeled the federal crack cocaine disparity the "new Jim Crow" law. Tr. of "Social Justice and the War on Drugs" (morning panel II) (Oct. 4, 2000) (statements of Hon. Robert Sweet and former Baltimore mayor Kurt Schmoke), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html.

The costs of draconian crack sentences are borne not only by "deteriorating neighborhoods" but by taxpayers forced to shoulder the bill for offenders serving "inordinately lengthy sentences at an enormous cost." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center). Lengthy sentences for low-level, first-time offenders contribute substantially to the growing federal prison overcrowding problem. *See* Marc Mauer, *Race to Incarcerate* 167-69, 172 (2d ed. 2006) (documenting rise in number of prisoners and particularly those incarcerated for drug offenses); *see also id.* at 162 ("[L]aw enforcement is more likely to target cocaine users or crack cocaine users.").[10]

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[9] The strong racial correlation of federal crack defendants exists despite the fact that "whites comprise a majority of crack users." Marc Mauer, *Race to Incarcerate* 172 (2d ed. 2006).

[10] Furthermore, in terms of the risk of recidivism, "[t]he folly of using expensive prison space for drug offenders, even traffickers, has been documented in research conducted on the federal prison population." Mauer, *supra*, at 172. Using data that showed the recidivism rates for comparable group of offenders released from prison in 1987, the study

4. Against the catastrophic nature of these problems, the original justifications for the 100:1 ratio cannot remotely survive two decades' worth of careful scrutiny. The most often cited rationale for the 100:1 ratio is the false perception that there are tangible differences between the two substances. *See, e.g.*, 132 Cong. Rec. 26,447 (1986) (statement of Sen. Chiles) (stating that disparate "treatment is absolutely essential because of the especially lethal characteristics of this [crack] form of cocaine"). However, a high-level representative from the U.S. Department of Health & Human Services recently debunked that myth by testifying that "the pharmacological effects of cocaine are the same, regardless of whether it is in the form of cocaine hydrochloride [powder] or crack cocaine, the base." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 166 (test. of Dr. Nora D. Volkow, Director, Nat'l Inst. on Drug Abuse, Nat'l Institutes of Health, U.S. Dept. of Health & Human Servs.). The Commission has likewise noted that the differential treatment cannot be justified based upon this alleged difference. *See* U.S.S.C., *Fifteen Years*, *supra*, at 132.[11]

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showed that "only 19 percent of the low-risk drug traffickers [*i.e.*, more than 30 percent of the total federal drug prisoner population] were re-arrested during the three years after release, and that none of those arrested were charged with serious crimes of violence." *Id.* at 172-73.

[11] The Commission noted in particular that:

> [T]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. . . . Powder cocaine that is smoked is equally addictive as crack cocaine, and powder cocaine that is injected is more harmful and more addictive than crack cocaine . . . . Recent research has demonstrated that some of the worst harms thought to be associated with crack cocaine use, such as disabilities associated with pre-natal cocaine exposure, are not as severe as initially feared and no more serious than crack cocaine exposure than from powder cocaine exposure.

U.S.S.C., *Fifteen Years*, *supra*, at 132.

The other original justification for the 100:1 ratio was the perception that crack cocaine is uniquely correlated to more serious crimes. *See* U.S.S.C., *1995 Special Report*, *supra*, at 118-19 (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs"). This presumption, too, has been refuted. "More recent data indicate that significantly less trafficking-related violence or systemic violence . . . is associated with crack cocaine trafficking offenses than previously assumed." U.S.S.C., *2002 Report to Congress*, *supra*, at 100 (for example, in 2000, only 2.3% of crack cocaine offenders used a weapon); *see also* U.S.S.C., 2006 Public Hearing Tr., *supra*, at 226-27 (test. of Profs. Jonathan Caulkins & Peter Reuter) (crack cocaine violence has declined over time because the average age of crack users has increased).[12] And that is to say nothing of the problem we have already identified that the 100:1 ratio results in lengthier sentences for low-level crack users than for the very high-level powder cocaine dealers who supply the drugs needed to convert powder cocaine into crack cocaine.

6. The Sentencing Commission agrees. One of the Commission's statutory duties is to monitor the operation of the Guidelines and federal sentencing system and to propose amendments to Congress for appropriate modifications. *See* 28 U.S.C. § 994. For over a decade, the Commission has urged Congress to eliminate the 100:1 ratio.

In 1995, the Commission released a report concluding that congressional objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on a federal sentencing scheme that includes the 100:1 quantity ratio. *See* U.S.S.C., *1995 Special Report*, *supra*, at

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[12] In any event, district courts will, of course, impose higher penalties in cases involving violence, regardless of the type of drug at issue in the underlying offense. *See, e.g.*, U.S.S.G. §§ 2D1.1(b)(1), 2K2.1(b)(6) (weapons enhancements).

198-200. In reaching this conclusion, the Commission noted that the ratio punishes low-level crack offenders more harshly than wholesale powder distributors. *See id.* at 150-51. The Commission also cited the disproportionate impact of the policy on African-American defendants. *See id.* at 192.

In 1997, the Commission returned to Congress with a report once again recommending a modification to the 100:1 ratio. *See* United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF; *see also id.* at 9 ("[A]s the Commission reported in 1995, we again unanimously conclude that congressional objectives can be achieved more effectively without relying on the current federal sentencing scheme for cocaine offenses that includes the 100-to-1 quantity ratio."). This time, the Commission focused on the disproportionality of crack cocaine sentences to the measured harm to society from the use and sale of the drug. *See id.* at 9. Specifically, the Commission stated that, in its view, "federal sentencing policy should reflect federal priorities by targeting the most serious offenders in order to curb . . . drug trafficking and violent crime," and noted that "current federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year minimum penalty for crack cocaine too low." *Id.* at 7.

Even more recently, the Commission has reiterated its position, having specifically singled out the crack-powder disparity as a category having an "adverse [racial] impact," U.S.S.C., *Fifteen Years*, *supra*, at 131. Accordingly, the Commission concluded, "[r]evising the crack cocaine thresholds would . . . dramatically improve the fairness of the federal sentencing system." *Id.* at 132. The Commission's concern stems from its central mission, as articulated by the relevant enabling statutes. Section 991(b)(1)(B) of Title 28, for example, mandates that the Commission "provide

certainty and fairness in meeting the purposes of sentencing, avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[13]

C. The Sentence Imposed By The District Court Was Not Unreasonable.

1. Even if this case did not involve a crack cocaine defendant, the district court's decision would have reasonable, and the Courts of Appeals' decisions should be reversed. Indeed, the district court acted precisely as it was supposed to in following this Court's *Booker* decision.

But even if the Court were otherwise inclined to decide that the actual sentencing decision reached by the district court might be *un*reasonable in some other context, the fact that this case involved a crack cocaine offense renders the district court's sentence reasonable here. For the reasons identified above, the 100:1 ratio and its various effects impact many of the § 3553(a) factors a district court is *required* to consider in selecting a sentence. *See* 18 U.S.C. § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant"); *id.* § 3553(a)(2)(A) ("seriousness of the offense;" "just punishment for the offense"); *id.* § 3553(a)(2)(C) ("protect the public from further crimes of the defendant"); *id.* § 3553(a)(2)(D)

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[13] Although Congress has acknowledged the criticism of the 100:1 powder-to-crack ratio in asking the Commission to make recommendations regarding whether it should eliminate or reduce the disparity, it has failed to act despite the Commission's recommendations. *See, e.g.*, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995) (rejecting Commission's recommendations); *see also United States v. Pho*, 433 F.3d 53, 56 (1st Cir. 2006) (reporting congressional inaction in face of Commission's recommendations since 1995).

("provide the defendant with needed educational or vocational training, [or] correctional treatment in the most effective manner"); *id.* § 3553(a)(6) ("the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

Indeed, in a case like petitioner's, involving a first-time offender, a non-violent offense, and small quantities of cocaine, the district court would not have acted reasonably by imposing a Guidelines sentence. But even if a greater sentence would arguably have been reasonable, the sentence actually imposed here—which was still much greater than the sentence would have been had petitioner been caught with powder rather than crack cocaine[14]—certainly was not *unreasonable*, the relevant standard under *Booker*. *See Booker*, 543 U.S. at 765 (court of appeals' review limited to question whether the sentence imposed by the district court was "unreasonable, having regard for . . . the factors . . . set forth in [§ 3553(a)]; and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of [§ 3553(c)]").

2. Other federal courts have similarly concluded since *Booker* was decided that sentences imposed below the Guidelines range may be appropriate in crack cocaine cases. In *United States v. Fisher*, for example, the district court determined that the Guidelines range applicable to a crack cocaine defendant "substantially overstat[ed] the seriousness of the offense" following an analysis that discussed past criticisms of the 100:1 ratio. 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005), at *4-*7.[15] As another district court summed

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[14] As defense counsel pointed out to the sentencing judge, had petitioner been prosecuted for a total of 5.26 grams of powder cocaine, rather than crack, the applicable Guidelines range would have been 6 to 12 months. *See* Pet. at 2.

[15] The Second Circuit has recently concluded that it may not adopt a weight ratio other than the 100:1 ratio prescribed by Congress, and

up, "[t]he growing sentiment in the district courts is clear" that the 100:1 ratio "cannot withstand . . . scrutiny" under § 3553(a). *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005).[16]

Likewise, several judges on various courts of appeals have made the point that, following *Booker*'s mandate that judges consider all of the factors listed under § 3553(a), "a sentencing court is not only *permitted* but is *required* to evaluate the propriety of applying the 100:1 crack-cocaine ratio in a particular case." *United States v. Williams*, __ F.3d __, 2006 WL 3615300, at *13 (11th Cir. Dec. 13, 2006) (Barkett, J., dissenting from denial of rehearing *en banc*) (emphases in original). As another judge specifically noted, the Commission's findings with respect to the effects of the 100:1 ratio "can help sentencing courts analyze the § 3553(a) factors . . . . The Commission's findings, in other words, can be considered insofar as they are *refracted through* an individual defendant's case." *United States v. Eura*, 440 F.3d 625, 637 (4th Cir. 2006) (Michael, J., concurring) (emphasis in original); *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process"). As these judges have correctly articulated, below-Guidelines range sentences may be—indeed, often *will* be—reasonable in many crack cocaine cases following *Booker*.

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expressly mentioned both the *Fisher* and *Perry* district court opinions (discussed above) as having indicated disagreement with the ratio. *See United States v. Castillo*, 460 F.3d 337, 352-53 (2d Cir. 2006). The court nonetheless expressly noted that it "did not express any opinion on the reasonableness of [either] of those sentences in light of the specific facts involved in those cases." *Id.* at 353 n.4.

[16] In fact, a substantial number of district courts have issued opinions with similarly explicit discussions since *Booker*. *See, e.g.*, *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. May 6, 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

3. Nor is there any reason to fear that the *Booker* standard, properly employed, confers unlimited discretion on sentencing judges. Courts still must weigh all the factors and arrive at a sentence that is reasonable in light of that analysis. Moreover, many federal statutes contain mandatory minimums, and in such cases judges will have a starting point they cannot go below. *See, e.g.*, 12 U.S.C. § 630 (minimum of 2 years' imprisonment for embezzlement, fraud, or false entries by a bank officer); 18 U.S.C. § 225 (minimum of ten years' imprisonment for organizing, managing, or supervising a continuing financial crimes enterprise); 18 U.S.C. § 2251(d) (minimum of five years' imprisonment for a second offense of sexually exploiting a minor). *Cf. Harris v. United States*, 536 U.S. 545, 557 (2002) (upholding judicial fact-finding that increased statutory minimum sentence). In crack cocaine cases, in particular, unless and until Congress revisits the current mandatory minimum regime of 5 (and 10) years for 5 (and 50) grams of crack, minimum sentences will be triggered in approximately 80% of all crack cocaine cases. *See* U.S.S.C., *Sourcebook*, *supra*, at 106, 324.

At the same time, however, many sentencing judges will of course encounter facts like the ones at issue in petitioner's case (or other fact patterns equally deserving of lighter sentences than the Guidelines range would permit). As noted above, not only were the quantities relatively low, but Mr. Claiborne had no previous criminal record and was specifically found to be at a low risk of recidivism by a district court judge evaluating him in person and from the vantage point of experience. The multitude of relevant § 3553(a) factors implicated by the facts of Claiborne's case all pointing toward a relatively short sentence in order to avoid imposing a sentence "greater than necessary." The district court's sentence was well within its discretion following *Booker*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Dated: December 18, 2006

Supreme Court, U.S.
FILED
JAN 22 2007
OFFICE OF THE CLERK

Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

VICTOR A. RITA, JR.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Eighth Circuits

BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether a district court's application of the Sentencing Guidelines produces a presumptively reasonable sentence.

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INTEREST OF *AMICUS CURIAE*[1]

Congress's driving motivation in the Sentencing Reform Act of 1984 was to reduce unwarranted disparity in federal sentencing, so that "defendants with similar records who have been found guilty of similar criminal conduct" are treated in like fashion, regardless of the judge who imposes the sentence. 28 U.S.C. § 991(b)(1)(B); *see* 18 U.S.C. § 3553(a)(6). To accomplish that purpose, Congress established the United States Sentencing Commission (the "USSC" or the "Commission") as an "independent commission in the judicial branch of the United States" charged with issuing and continually revising the United States Sentencing Guidelines (the "Guidelines"). 28 U.S.C. §§ 991(a)-(b), 994(b)(1). Accordingly, the Commission has a direct interest in the standards for appellate review of sentences issued in consideration of those Guidelines. The Commission previously submitted briefs in this Court as *amicus curiae* in *United States v. Booker*, 543 U.S. 220 (2005), and *Mistretta v. United States*, 488 U.S. 361 (1989).

STATEMENT

A. The Problem Of Disparity In Sentences Identified By Congress

In 1984, Congress enacted the Sentencing Reform Act (the "Act") in response to an emerging consensus that the federal sentencing system was seriously broken and in need of major repair. Before the Act, "each judge [was] left to apply his own notions of the purposes of sentencing. As a result, . . . Federal judges mete[d] out [a] . . . wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." S. Rep. No. 98-225, at 38 (1983). Indeed,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

"[t]he absence of Congressional guidance to the judiciary . . . all but guaranteed that . . . similarly situated offenders . . . [would] receive different sentences." H.R. Rep. No. 98-1017, at 34 (1984). Numerous studies from the pre-Guidelines era confirmed that differences among judges in sentencing philosophies caused disparity.[2]

The principal purpose of the Act was to reduce these "glaring disparities," S. Rep. No. 97-307, at 956 (1981), between "defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Congress acknowledged the necessity of "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." *Id.* But Congress principally intended the Act to effect a dramatic shift away from complete judicial discretion and toward more consistent, structured sentencing by establishing a "comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served." S. Rep. No. 98-225, at 39.

To that end, Congress limited sentencing judges to considering seven factors in imposing a sentence: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); the four purposes of punishment, *id.* § 3553(a)(2); "the kinds of sentences available," *id.* § 3553(a)(3); the applica-

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[2] *See* John S. Carroll *et al.*, *Sentencing Goals, Casual Attributions, Ideology, and Personality*, 52 J. Personality & Soc. Psychol. 107 (1987); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. Chi. L. Rev. 109, 114 (1975); Anthony Partridge & William B. Eldridge, Federal Judicial Center, *The Second Circuit Study: A Report to the Judges of the Second Circuit* 36 (1974); Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically From Principles of Punishment*, 33 Rutgers L. Rev. 799, 813 (1981); *see also* Kevin Clancy *et al.*, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. Crim. L. & Criminology 524 (1981).

ble Guidelines range, *id.* § 3553(a)(4); the Commission's policy statements, *id.* § 3553(a)(5); "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6); and "the need to provide restitution to the victims of the offense," *id.* § 3553(a)(7).

B. The Congressionally Directed Mission Of The Sentencing Commission

In directing the implementation of those statutory mandates, Congress created an agency within the judicial branch, to which it delegated the task of establishing a set of uniform sentencing policies and practices to be used as guidelines by judges in choosing specific sentences within the wide statutory ranges set out in Title 18 of the U.S. Code. To prevent the appearance of partisanship from affecting that process, Congress directed that "[n]ot more than four" of the Commission's seven voting members "shall be members of the same political party." 28 U.S.C. § 991(a). In keeping with the bipartisan spirit of the Act, Congress did not adopt a single philosophy of sentencing, nor did it encourage the Commission to do so. Instead, it charged the Commission with assuring that each of the four often-competing purposes of punishment – retribution, deterrence, incapacitation, and rehabilitation, *see* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b)(1)(A) – is adequately met.

Congress directed the Commission to develop sentencing ranges for specific categories of offenses involving similarly situated defendants. It specified that the maximum of a range generally should "not exceed the minimum of that range by more than the greater of 25 percent or 6 months." 28 U.S.C. § 994(b)(2). Congress fully expected that "there [would] be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98-225, at 168. Congress intended

that there "be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*

Upon implementation of the Guidelines, Congress required the Commission's work to be a continually evolving process based on experience and empirical study, producing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

C. The Range Of Factors Congress Directed The Commission To Consider

Congress directed the Commission to consider seven factors – all of which have been traditionally considered by judges in sentencing – in formulating offense categories: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense. *See* 28 U.S.C. § 994(c)(1)-(7).

Congress also identified 11 offender characteristics, such as age, education, vocational skills, physical condition (including drug dependence), and family and community ties, and instructed the Commission to decide whether those characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence." *Id.* § 994(d)(1)-(11). Congress prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d). It further specified that, "in recommending a term of imprisonment or length of a term of imprisonment," the Guidelines should reflect the "general inappropriateness" of considering certain other factors that might serve as proxies for forbidden factors, such as

education, vocational skills, employment record, and family and community ties. *Id.* § 994(e).

The Act provided the Commission with an extensive list of other specific instructions, often requiring the Commission to strike a balance between competing policy goals. *See id.* §§ 991(b), 994(a)-(o). For example, the Act directed the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." *Id.* § 994(m). At the same time, however, Congress cautioned the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." *Id.* § 994(g).

SUMMARY OF ARGUMENT

I. The courts of appeals are correct to accord a presumption of reasonableness to a Guidelines sentence because the Guidelines are the product of a comprehensive and collaborative process to implement the directives in the Sentencing Reform Act of 1984 and subsequent legislation. The Commission has faithfully carried out its legislative mandate according to procedures that are thorough and transparent. During more than 20 years of work, the Commission has amassed a considerable expertise, informed by data collected from hundreds of thousands of past sentencing decisions and extended, rigorous debate between all sectors of the criminal justice system. Applying its congressionally delegated policy judgment to the results of its continuous empirical research, the Commission has produced an evolving set of Guidelines, the application of which produces a sentence that is reasonable in relation to Congress's purposes and comports with congressional sentencing prerogatives.

Courts of appeals should presume that application of the Guidelines produces reasonable sentences. Both Congress and this Court have recognized that the Commission is to play a principal role in crafting federal sentencing policy. Presuming the reasonableness of a Guidelines sentence properly acknowledges that role. A presumption

of reasonableness on appeal does not, as petitioners suggest, reinstate a mandatory Guidelines regime. As the Commission's data show, in those circuits that have adopted a presumption of reasonableness, there has been no discernible effect on the rate at which district courts voluntarily choose to adhere to the Guidelines. Likewise, in those circuits that have declined to adopt a presumption, no increase in sentences outside the Guidelines range can be detected.

II. The arguments against a presumption of reasonableness are unpersuasive. Petitioners and their *amici* claim that Guidelines ranges do not incorporate the factors that a sentencing judge must consider in imposing a sentence under 18 U.S.C. § 3553(a). But that contention misunderstands the structure of the Sentencing Reform Act. The Act guided the Commission in integrating the purposes of sentencing into a workable sentencing structure. *See* 28 U.S.C. §§ 991, 994. As the First Circuit has recognized, the Guidelines "are the only *integration* of the *multiple* [§ 3553(a)] factors." *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc).

ARGUMENT

I. AN APPELLATE COURT IS CORRECT TO APPLY A PRESUMPTION OF REASONABLENESS TO A SENTENCE WITHIN THE GUIDELINES

A. The Process That Produced The Guidelines Evidences The Reasonableness Of Sentences That Follow The Guidelines

In promulgating and amending the Guidelines, the Commission has diligently pursued a thorough and reasoned administrative process, designed to be collaborative and transparent. Application of the Guidelines resulting from that process produces a reasonable sentence that incorporates the purposes of sentencing that Congress articulated in the Sentencing Reform Act of 1984.

1. The Commission chose an appropriate starting point for the Guidelines framework

As it began to draft the Guidelines, the Commission chose to tap the collective expertise of federal judges. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17-18 (1988) ("Breyer, *Key Compromises*") (explaining the basis for that decision). Sentencing judges routinely balanced the competing purposes of punishment and of any mitigating and aggravating factors. By drawing averages from thousands of past sentencing decisions and examining data in tens of thousands of cases, the Commission was able to reduce disparity (the very definition of averaging), while striking a reasonable balance between the purposes of punishment. *See* USSC, *Report to Congress: Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16 (June 1987) ("Supp. Report"). That analysis allowed the Commission to discern what offense and offender characteristics tended to affect the sentencing decision, and to what extent. The Commission assigned "weights" to those relevant factors that traditionally have been considered appropriate sentencing factors, thereby guiding courts in determining how each factor should affect the calculation of the sentence. *See* USSC, *Guidelines Manual* § 1A1.1 cmt. background (Intro. and Gen. App. Principles (A)(4)(a)) (2006) ("USSG"); *see also* 18 U.S.C. § 3661.

2. The Commission promulgated the initial Guidelines in a transparent, collaborative process

From the outset of its work, the Commission was committed "to developing sentencing guidelines informed by the widest measure of public comment." Draft of Sentencing Guidelines, 51 Fed. Reg. 35,080 (Oct. 1, 1986) (preliminary notice). To that end, the first Commission decided that all of its regular meetings would be open to the public. *See* Meeting Policy, 51 Fed. Reg. 11,869 (Apr. 7, 1986) (notice). The Commission established advisory

and working groups, which included representatives from United States Attorneys offices, state district attorneys, federal probation officers, defense attorneys, scholars, and federal judges. *See* 51 Fed. Reg. at 35,080, 35,082. The Commission invited these groups (including three groups of federal judges) to participate in working sessions with Commission members and staff to examine early drafts of the Guidelines and to opine on the important drafting issues facing the Commission. *See id.* at 35,082-83. The Commission also obtained information from a wide array of sources, through solicitations to federal and state agencies, and in public hearings.[3] *See id.* at 35,083.[4]

After those hearings, the Commission published a preliminary draft of the Guidelines. *See* 51 Fed. Reg. at 35,080. Although not required by Congress to do so, publication provided the Commission with "a vehicle for focused critical analysis and public comment." *Id.* at 35,081. The Commission received and considered comment from hundreds of groups and individuals. *See id.* Those comments led the Commission to issue a revised draft of the Guidelines in February 1987. *See* Proposed Sentencing Guidelines and Policy Statements, 52 Fed. Reg. 3920 (Feb. 6, 1987) (notice). After a third set of

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[3] The Commission conducted a series of topical public hearings concerning the Guidelines. *See* Hearing Notices: 51 Fed. Reg. 11,869 (Apr. 7, 1986) (pertaining to offense seriousness); 51 Fed. Reg. 17,850 (May 15, 1986) (treatment of prior criminal record); 51 Fed. Reg. 19,918 (June 3, 1986) (organizational sanctions); 51 Fed. Reg. 24,781 (July 8, 1986) (sanctions other than incarceration); 51 Fed. Reg. 33,338 (Sept. 19, 1986) (plea agreements). The attendees included representatives of the executive and judicial branches of government, the defense bar, other participants in the federal criminal justice system, and public interest groups, among others. The complete list of attendees may be found in Appendix A of the Supplementary Report.

[4] The Commission also examined existing state guidelines systems, *see* Supp. Report at 14, but ultimately concluded that "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes," *id.*; *see also* USSG § 1A1.1 cmt. background (Intro. and Gen. App. Principles (A)(4)(a)).

revisions, the Commission submitted the Guidelines and policy statements to Congress. *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (May 13, 1987) (notice). The Guidelines became effective on November 1, 1987, after a six-month period of congressional review. *See* 18 U.S.C. § 3551 note.[5]

3. The Commission continues to amend the Guidelines, subject to congressional approval, based on judicial experience and empirical study

Congress expected the Commission continually to revise the Guidelines "to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing." S. Rep. No. 98-225, at 77; *see* 28 U.S.C. § 994(*o*); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991) ("Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest."). The Commission recognized Congress's expectation, explaining that the Guidelines would be "refined and amended as practical experience, analysis, and logic dictate." 52 Fed. Reg. at 3921. Consistent with Congress's direction, the Commission has amended the Guidelines – 696 times, to date – in response to a variety of considerations, including court decisions, congressional directives, formal and informal input from federal judges, prosecutors, defense attorneys, probation officers, academics, and other interested groups, and the Commission's own evaluations of needed refinements. *See* USSG App. C & Supp.[6]

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[5] The Guidelines were not fully implemented until after *Mistretta v. United States*, 488 U.S. 361 (1989), in which this Court upheld the Act against a challenge that it violated the separation of powers.

[6] For example, the Commission has amended the Guidelines at least 25 times in response to circuit conflicts alone. *See* USSG App. C, amends. 484, 487, 493, 549, 577, 579, 580, 581, 582, 583, 591, 597, 602, 603, 604, 613, 614, 615, 617, 630, 632, 634, 635, 645, 660. That amendment process has been noted by this Court, and frequently

In the aftermath of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), for example, the Commission analyzed post-*Booker* cases and prepared a report to Congress on its findings. The Commission is actively looking at some of the issues raised in the report and has made addressing those issues part of its priorities for the 2006-2007 amendment cycle and beyond.[7] This evolutionary process, steadily updating the Guidelines upon the basis of empirical research, expert analysis, and congressional directives, is precisely the work of the Commission this Court identified in *Booker* as essential to "promot[ing] uniformity in the sentencing process." 543 U.S. at 263.

Data collected by the Commission have provided empirical support for congressional action as well as Commission amendments. For example, the Commission's data provided the primary impetus for Congress's enactment of the statutory safety-valve provision at 18 U.S.C. § 3553(f), which permits the imposition of a Guidelines sentence without regard to a statutory mandatory minimum sentence in certain cases. *See* H.R. Rep. No. 103-460, at 4 & n.5 (1994) (citing USSC, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) ("*Mandatory Penalties Report*")); *see also* William W. Wilkins, Jr. & John R.

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invoked by the Solicitor General as a reason not to grant certiorari to resolve circuit conflicts on issues arising under the Guidelines. *See Braxton*, 500 U.S. at 348.

[7] For example, the Commission's *Final Report on the Impact of United States v. Booker on Federal Sentencing* (Mar. 2006) ("*Booker Final Report*") identified issues associated with criminal history as one of the top reasons for all types of below-range sentences in the post-*Booker* era. Moreover, in 2004, the Commission staff completed an empirical study on recidivism rates and first offenders, the results of which provided an additional basis for reconsideration of the Guidelines' treatment of criminal history. *See* USSC, *Recidivism and the "First Offender"* (May 2004). Accordingly, the Commission has included a review of criminal history as one of its final priorities in the 2006-2007 amendment cycle. *See* Final Priorities, 71 Fed. Reg. 56,578 (Sept. 27, 2006) (notice).

Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 65 (1993) ("Wilkins, *Role of Sentencing Guideline Amendments*").[8]

In addition to its extensive data analysis, the Commission solicits input on possible amendments from stakeholders in the criminal justice system. *See* 28 U.S.C. § 994(*o*) (directing the Commission to consult "with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system"). Sentencing judges have been a particularly valuable source of information. After the Criminal Law Committee of the Judicial Conference expressed concerns to the Commission about the Guidelines' treatment of economic crimes, for example, the Commission undertook a multi-year study, including extensive field testing with federal judges and probation officers of a new proposed loss definition. Based on that research, the Commission consolidated the theft and fraud guidelines, and promulgated a new common loss table. *See* USSC, *A Field Test of*

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[8] The Commission's use of sentencing data is evidenced in many of its "Reasons for Amendment[s]," explanations that accompany each amendment to the Guidelines. *See, e.g.*, USSG App. C, amends. 374, 450, 531, 555, 592, 596, 597, 624, 648, 652, 663, 678. Commission reports and working papers are also replete with examples of the Commission's use of sentencing data. *See, e.g.*, USSC, *Report to Congress: Increased Penalties under the Sarbanes-Oxley Act of 2002* (Jan. 2003); USSC, *Report to Congress: Adequacy of Federal Sentencing Guidelines Penalties for Computer Fraud and Vandalism Offenses* (June 1996); USSC, *Intellectual Property Amendments: 2006 Policy Development Team Report* (May 2006); USSC, *2006 Steroids Report* (Mar. 2006).

The Commission also uses the data to (1) provide prison impact assessments to Congress as required under 18 U.S.C. § 4047; (2) "publish data concerning the sentencing process"; and (3) "collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a)." 28 U.S.C. § 995(a)(14), (15). Examples of such publications include USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) ("*Fifteen-Year Report*"), and *Booker Final Report*.

Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission (Oct. 1998). Similarly, the 2001 amendment to § 2L1.2 (Unlawfully Entering or Remaining in the United States) was prompted by "concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border." USSG App. C, amend. 632.

When the Commission acts upon that information, it employs a transparent amendment process. Each year, the Commission publishes a notice of possible policy priorities for the regular amendment cycle, seeking public comments. *See, e.g.*, Sentencing Guidelines for United States Courts, 71 Fed. Reg. 44,344 (Aug. 4, 2006) (notice). After reviewing public comments, the Commission votes on the priorities and publishes a notice of final priorities. *See, e.g.*, 71 Fed. Reg. at 56,578. It then engages in an open process, with public hearings and comment, before promulgating amendments. *See, e.g.*, Proposed Amendments, 71 Fed. Reg. 4782 (Jan. 27, 2006) (notice; request for public comment; notice of public hearings); *see also* USSC Rules of Practice and Procedure 3.4, 4.3, 4.4, 4.5; 28 U.S.C. § 994(p) (specifying 180-day congressional review period).

Congress has not hesitated either to disapprove of Commission decisions with which it does not agree[9] or to direct the Commission to take action on matters it deems important.[10] On the whole, however, Congress has time and again approved the Guidelines and the numerous amendments to them, reaffirming its confidence in the Commission as its delegate in crafting sentencing policy.

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[9] *See, e.g.*, Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (disapproving a Guidelines amendment that would have equalized the Guidelines penalties for powder cocaine and crack cocaine offenses based solely upon drug quantity).

[10] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 905, 116 Stat. 745, 805-06 (directing the Commission to make various changes to the Guidelines, including increasing penalties for offenders who commit corporate crimes).

See United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005) ("[t]he Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses"). Based as they are on analysis from hundreds of thousands of cases and years of expert study, the Guidelines ranges represent reasonable choices that comport with congressional purposes in the Act and subsequent legislative directives.

B. An Appellate Court's Presumption That A Sentence Within The Guidelines Range Is Reasonable Gives Appropriate Recognition To Congress's Intent For The Commission To Play A Continuing Role In Federal Sentencing

1. When a district court concludes with respect to a particular defendant that the Guidelines adequately account for all of the legally relevant sentencing factors and that the defendant fits well into a Guidelines category – and therefore ought to be treated like other offenders falling within that category – the court of appeals should presume that the resulting sentence is reasonable. Application of a presumption of reasonableness to a sentence within the Guidelines range recognizes the Commission's extensive efforts to produce a rational sentencing system that incorporates the collective knowledge and experience of all of the participants in the criminal justice system, just as Congress intended. A sentencing judge, utilizing the Guidelines, is significantly better able to marshal all of that systemic information in arriving at a reasonable (and reasonably uniform) outcome. Following the Guidelines provides the benefit of the Commission's thorough process and produces regularized sentencing outcomes, thus fulfilling Congress's central purpose of reducing unwarranted disparity.

Because the Commission was charged with striking an appropriate balance between numerous competing policy goals, taking into account the views of opposing forces in the criminal justice system, the Guidelines inevitably represent a set of compromises. As with all compromises,

some stakeholders may have been left with the sense that the Guidelines are not perfect. But, as the original Commissioners learned, in sentencing policy, the perfect can be the enemy of the good. *See* Breyer, *Key Compromises* at 2, 8-12. Recognizing that a proper application of the Guidelines produces a "reasonable" sentence merely acknowledges that reasonableness is by definition a rough assessment of shared wisdom.

2. Presuming the reasonableness of a Guidelines sentence is consistent with *Booker*. In researching sentencing practices and refining the Guidelines, the Commission performs precisely the role that this Court envisioned for it in *Booker*. *Booker* severed only two subsections of the Act,[11] leaving in place the remainder of the sentencing system Congress devised[12] – a system in which the Guidelines play the central role. *See* 543 U.S. at 245. This Court explained that "[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further [congressional] objectives." *Id.* at 264.

In particular, the Court stated that "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Id.* Thus, the Court validated the Commission's continued research and policymaking roles in carrying into effect Congress's primary goal of avoiding unwarranted disparity: "The Sentencing Commission will continue to collect and study appellate court decision-making. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process." *Id.* at 263.

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[11] The standard of review contained in 18 U.S.C. § 3742(e) was one of the provisions of the Act struck down in *Booker*. *See* 543 U.S. at 245. The other was 18 U.S.C. § 3553(b), which made the Guidelines mandatory. *See id.*

[12] *See* 18 U.S.C. §§ 3551 *et seq.*; 28 U.S.C. §§ 991-998.

3. Contending that a Guidelines sentence is a reasonable sentence does not imply that a sentence outside the Guidelines range can never be reasonable. The Commission acknowledges that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to the sentencing decision." USSG § 1A1.1 cmt. background. Moreover, under § 3553(a), "sentencing decisions must be done case by case and must be grounded in case-specific considerations." *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006).[13]

C. Sentencing Data Show That According A Presumption Of Reasonableness To A Guidelines Sentence Does Not Frustrate Judicial Discretion

1. Petitioners argue that, when courts of appeals presume that Guidelines sentences are reasonable, district judges feel an irresistible pressure to follow the Guidelines, such that, even when judges view a non-Guidelines sentence as appropriate, they will select a within-Guidelines sentence for fear of being reversed on appeal. *See, e.g.*, Rita Pet. Br. 28 (arguing that "presumption . . . discourages courts from considering . . . information about the particular individual before the court"). Thus, petitioners claim, an appellate presumption of reasonableness renders the Guidelines effectively mandatory, in

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[13] Indeed, the Commission recommends that district judges follow a three-step process in sentencing after *Booker*: (1) calculate the Guidelines range; (2) consider the policy statements and the appropriateness of any departures from the applicable range; and (3) then consider whether a variance pursuant to § 3553(a) is appropriate. *See Booker Final Report* at 42. This process essentially is codified in the amended Statement of Reasons form issued by the Judicial Conference and approved by the Commission, which sentencing courts are statutorily required to use. *See* AO 245B (Rev. 06/05); 28 U.S.C. § 994(w)(1)(B) (as amended by the Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, Tit. VII, § 735(1), 120 Stat. 192, 271); *see also* proposed amended Fed. R. Crim. P. 11(b)(1)(M) (stating court's obligation "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)").

violation of *Booker*. But the Commission's data refute that argument.

If petitioners' theory were correct, one would expect to see over time a significant and widening gap between the rate of below-Guidelines sentences in circuits with a presumption of reasonableness and the rate of such sentences in circuits without a presumption. On the contrary, the rate at which sentencing judges impose a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure in circuits that apply a presumption of reasonableness (87.5 percent) is quite close to the rate (83.9 percent) in circuits that apply no presumption. *See* App. 1a. And the difference in those rates has remained virtually unchanged since those circuits adopted the respective presumption rules. Even when the data are broken down by individual circuit, no meaningful trends are observable. *See* App. 2a-13a. Therefore, the empirical evidence, namely post-*Booker* rates of both departures and variances from the Guidelines sentence, demonstrates that applying an appellate presumption of reasonableness does not deter sentencing judges from exercising their discretion to impose a sentence outside of the applicable Guidelines range.

2. In 86 percent of all sentences handed down since *Booker*, judges have chosen a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure. This post-*Booker* figure simply reflects the satisfaction with the Guidelines that sentencing judges expressed to the Commission before *Booker*. According to an extensive pre-*Booker* survey undertaken by the Commission, judges generally agreed that the Guidelines provide punishment levels that reflected the seriousness of the offense (18 U.S.C. § 3553(a)(2)(A)); afforded adequate deterrence to criminal conduct (*id.* § 3553(a)(2)(B)); protected the public from further crimes of the defendant (*id.* § 3553(a)(2)(C)); and avoided unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (*id.* § 3553(a)(6)). *See* Linda Drazga

Maxfield, USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* I-1 & Apps. A, C (Mar. 2003). Thus, sentencing judges – who are the best authorities on the propriety of the Guidelines – told the Commission that, in most cases, the Guidelines range provided a reasonable sentence.

II. THE GUIDELINES RANGES INCORPORATE THE STATUTORY FACTORS THAT A SENTENCING JUDGE CONSIDERS IN IMPOSING A SENTENCE

Petitioners and their *amici* principally contend that Guidelines sentences should not be presumed reasonable because the Guidelines do not take into account the factors that, under 18 U.S.C. § 3553(a), a sentencing judge must consider in imposing a sentence. *See, e.g.*, National Association of Criminal Defense Lawyers ("NACDL") *Amicus* Br. 12-21. That claim misunderstands the Commission's practice and the Act, which directed the Commission to consider facts that encompass the § 3553(a) factors. *See* 28 U.S.C. §§ 991, 994. As it was instructed to do by Congress, the Commission has carefully considered the § 3553(a) factors in creating categories of common offense and offender characteristics, including various mitigating and aggravating circumstances.

A. The Guidelines Produce A Sentence That Is Sufficient, But Not Greater Than Necessary, To Carry Out The Purposes Of Sentencing

Section 3553(a) directs district courts to choose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing identified in the Act. Petitioners contend that, contrary to that directive, which is referred to as the "parsimony" provision, the Guidelines often recommend sentences greater than necessary to satisfy the statutory purposes of sentencing.

Petitioners are incorrect. The *Guidelines Manual* instructs sentencing courts to consider § 3553(a) when selecting a specific sentence within the Guidelines range. *See* USSG Ch. 5 intro. cmt. In more than 40 percent of

post-*Booker* cases sentenced within the applicable range, the sentencing court has selected a sentence *above* the minimum of the range, demonstrating that the low end of the range was not sufficient to meet the statutory purposes of sentencing. *See* USSC, *2005 Sourcebook of Federal Sentencing Statistics* 298 (2006); USSC, *Preliminary Quarterly Data Report* 38 (Dec. 2006).

In addition, Congress had the opportunity to disapprove every provision of the current Guidelines. It cannot be presumed that Congress permitted those provisions to take effect despite a belief that they were inconsistent with Congress's statutory directive in § 3553(a).

More fundamentally, petitioners' claim is inherently subjective. One cannot sensibly evaluate compliance with the parsimony provision without first making a judgment about what punishment is "necessary" and "sufficient." On that score, there will always be room for good-faith disagreements among reasonable people as to what sentence is appropriate for particular offenses and offenders.

Recognizing the Commission's role as a primary sentencing policymaker consistent with congressional intent, petitioners seek to support their reliance on the parsimony provision by citing Commission statements disagreeing with congressional mandates, such as mandatory minimum sentences and the disparity between sentences for powder cocaine and crack cocaine (the crack/powder ratio). *See* Rita Pet. Br. 36-37 (citing *Fifteen-Year Report* at 135). But the Commission and sentencing judges (like the petitioners) must abide by the will of Congress, even when they might prefer a different policy outcome. *Cf. United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006) ("[A]llowing sentencing courts to subvert Congress' clearly expressed will certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress."). It cannot be the case that a sentence is unreasonably high under

Congress's parsimony provision when Congress itself elsewhere made the choice for severity.[14]

B. The Guidelines Ranges Appropriately Consider The Nature And Circumstances Of The Offense

Section 3553(a)(1) requires sentencing judges to consider "the nature and circumstances of the offense." Congress directed the Commission to consider substantively equivalent factors in forming the Guidelines – namely, the aggravating and mitigating circumstances of the crime and the nature and degree of the harm caused by the crime. *See* 28 U.S.C. § 994(c)(1)-(3). Congress intended the sentencing judge to consider "such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstance surrounding the offense." S. Rep. No. 98-225, at 75. The Commission incorporated those same considerations into the Guidelines. *See generally* USSG §§ 2B1.1, 2K2.4, 3B1.1, 3B1.2.

Petitioners contend, however, that only the sentencing judge can appropriately consider the nature and circumstances of the particular offense at issue. They claim that the Guidelines are a mechanical, arithmetic exercise, the product of which is insufficiently sensitive to the individual case. *See* Rita Pet. Br. 10. But that criticism misunderstands the Guidelines. Application of the Guidelines involves discretionary determinations by the district judge at every turn. For example, USSG § 3B1.2 requires the district court to consider the defendant's "role in the

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[14] In seeking to assure that sentences are no higher than necessary, the Commission has at times sought to persuade Congress to adopt less severe penalties, with some success. For example, the Commission has long opposed mandatory minimum penalties for drug trafficking offenses. Relying on its empirical research, Congress responded to the Commission's recommendation by passing the "safety valve" provision, by which offenders with a minimal criminal history can escape the mandatory minimum if they meet certain criteria. *See* USSG § 5C1.2.

offense," which includes mitigation of, enhancement of, or no change to the offense level.[15] The Guidelines are replete with instances in which the district court must assess the nature and circumstances of the offense and the offender.

Amicus New York Council of Defense Lawyers ("NYCDL") contends that the Guidelines place disproportionate emphasis on drug quantity to the exclusion of other relevant factors. *See* NYCDL Br. 10 (*Claiborne*, No. 06-5618). But, as the *Fifteen-Year Report* explains, while the Commission was drafting the original Guidelines, Congress passed the Anti-Drug Abuse Act of 1986 ("ADAA"), including stiff 5- and 10-year mandatory minimum penalties keyed to specific drug quantities. To avoid so-called sentencing "cliffs," where a trivial change in quantity has a dramatic effect on the sentence, the Commission chose to "link the quantity levels in the ADAA to guideline ranges corresponding to the five- and ten-year mandatory minimum sentences." *Fifteen-Year Report* at 49. Had the Commission "given more weight to other potentially relevant factors, such as an offender's role within the drug trafficking organization," *id.*, as NYCDL urges (at 20-21 (*Rita*, No. 06-5754)), then sentences under the Guidelines would not have reflected the seriousness of the offense as determined by Congress's mandatory minimum sentences.

C. In Keeping With The Directives Of The Act, The Guidelines Account For The History And Characteristics Of The Defendant

Section 3553(a)(1) also directs the court to consider the "history and characteristics of the defendant." Petitioners

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[15] The mitigating role adjustments, for example, leave it to the district court to decide whether that role was "minimal" (in which case the offense level is reduced by four levels) or "minor" (warranting a reduction of only two levels). Moreover, a difference of up to four levels has no small effect on the sentence: the Guidelines range for an offender with no criminal history and an offense level of 16 would be 21-27 months; reducing the offense level to 12 would potentially cut the sentence in half, with a range of 10-16 months.

argue (Rita Pet. Br. 20-21; Claiborne Pet. Br. 20) that the Commission failed sufficiently to integrate that factor into the Guidelines because it prohibited or discouraged consideration of certain individual characteristics that petitioners assert are relevant to the sentencing determination. They cite examples such as include age, marital status, gender, employment, and family ties. Petitioners and their *amici* fail to consider the context of the Act as a whole and the congressional concerns that led to its passage.

1. Congress feared that the evident disparities in sentencing resulted from discrimination. The Act accordingly directed the Commission to "assure that the guidelines and policy statements [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). And the legislative history made it "absolutely clear" that it would be inappropriate to "afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." S. Rep. No. 98-225, at 171. Thus, the Commission understood that "the imposition of different sentences based on such factors as race, sex, national origin, creed, or socio-economic status, on defendants with similar records who have been found guilty of similar conduct, constitutes a form of unwarranted disparity." William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 Crim. L.F. 355, 368 (1991).

Implementing Congress's command, the Commission endeavored "to ensure that other considerations, possibly associated with a defendant's race or personal status, are not used to 'camouflage' the improper use of those factors as to which the statute mandates neutrality." *Id.* at 371. Thus, the Commission decided to prohibit or discourage consideration of certain other offender characteristics, such as "lack of youthful guidance." *See* Wilkins, *Role of Sentencing Guideline Amendments* at 83-85. That

decision was reasonably calculated to reduce unwarranted disparity and to balance the competing purposes of sentencing in § 3553(a)(2).

In addition to those prohibited considerations, Congress specifically discouraged consideration of several of the other offender characteristics about which petitioners complain, instructing the Commission that the Guidelines should "reflect the general inappropriateness" of considering "education, vocational skills, employment record, family ties and responsibilities, and community ties," in determining whether or for how long a defendant should be imprisoned. 28 U.S.C. § 994(e).

As a matter of construction, Congress likely did not mean to *require* the sentencing judge under § 3553(a) to consider offender characteristics that it elsewhere in the Act discouraged the Commission from incorporating into the Guidelines ranges. Although the directives in § 994 are aimed principally at the Commission, judges, who are familiar with principles of statutory interpretation, do not act unreasonably in concluding that, where § 3553(a) says "history and characteristics of the defendant," that phrase should not be read to include such characteristics as are declared elsewhere in the Act to be "general[ly] inappropriate[]" considerations. *See, e.g., Simpson v. United States*, 435 U.S. 6, 15 (1978) ("more specific" statutory provision must be given "precedence" over "general" provision).

2. Even putting aside Congress's specific instructions to the Commission about which offender characteristics to consider, Congress generally delegated to the Commission the job of choosing, on a uniform basis, those offender characteristics that should be considered in the sentencing decision, and to what extent. Listing 11 specific factors, Congress charged the Commission with deciding "whether [these] matters, *among others*, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and [the Commission] shall take them into account only to

the extent they do have relevance." 28 U.S.C. § 994(d) (emphasis added).

The Commission has carried out that command. It has found some factors appropriate to consider (*e.g.*, role in the offense, criminal history)[16] and others not (*e.g.*, drug dependence, employment record). Because Congress expressly entrusted such questions to the Commission, it is presumptively reasonable for a district court to follow the Commission's decisions.

3. Petitioners assert that certain of the offender characteristics excluded from the Guidelines, such as age in particular, may be predictive of recidivism and therefore must be considered by the sentencing judge under § 3553(a), because one of the purposes of sentencing listed there is "protect[ing] the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). But addressing recidivism is only *one* of the statutory purposes of sentencing. The Guidelines were designed to balance all four (often competing) statutory purposes of sentencing in § 3553(a)(2), and the Guidelines' treatment of criminal history accordingly reflects not only the risk of recidivism, but also the culpability of the offender. *See* Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192, 1997 WL 725695, at *3 (Jan./Feb. 1997) ("[T]he Sentencing Commission determined that it would only include factors that could be supported by both a just dessert and predictive rationale.").

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[16] Other offender characteristics determined by the Commission to be relevant to the purposes of sentencing – including abuse of a position of trust or use of a special skill in committing the offense, obstructing the administration of justice, and acceptance of personal responsibility for the criminal conduct – are factored into the applicable Guidelines range. *See* USSG §§ 3B1.3, 3C1.1, 3E1.1. Thus, the Commission has considered and incorporated relevant characteristics of the defendant into the Guidelines. Moreover, judges have always been free to consider other non-discriminatory offender characteristics in choosing a specific sentence *within* the Guidelines range.

Accordingly, instead of independently considering age (which has no bearing on culpability), the Commission decided to adopt a "decay" factor in its criminal history guideline. *See* USSG § 4A1.2(d)-(e). It determined that, the older a prior conviction, the less that conviction would raise an offender's criminal history score. Thus, prior convictions committed before a defendant reached 18 years old are treated less severely than offenses committed as an adult; a prior conviction for which a defendant received a sentence of less than 13 months of imprisonment is not considered if it is more than 10 years old; and prior convictions for which a defendant received a longer sentence are not considered when the defendant was released more than 15 years before the instant offense. *See id.* That approach accounts for the lower rate of recidivism among older offenders, while ensuring that older offenders with recent convictions are given a sentence that reflects their greater culpability.

D. The Guidelines Appropriately Balance The Statutory Purposes Of Punishment

Section 3553(a)(2) requires the sentencing judge to consider four purposes of punishment. *Amicus* NACDL contends (at 4-5, 14) that the Commission's failure to adopt any unifying philosophy of sentencing supports an inference that the Commission somehow gave up on considering the purposes of punishment. On the contrary, the Guidelines' failure to adopt a single "philosophy" of punishment is consistent with Congress's direction that the Guidelines account for all four purposes of punishment: "It should be clear that the Commission never made a commitment to choose a particular rationale, because such a commitment would be inconsistent with the statutory mandate of multiple purposes." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 917 (1990) ("Nagel, *Structuring Sentencing Discretion*").[17]

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[17] *See also* William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. Davis L. Rev. 571, 586

Moreover, the Commission has explained how it has taken the statutory purposes of punishment into account in formulating the Guidelines. For example, under § 3553(a)(2)(A), a sentence should "reflect the seriousness of the offense"; "promote respect for the law"; and "provide just punishment for the offense." To that end, the Guidelines assign each crime a score as a starting point in assessing the seriousness of the offense. *See Fifteen-Year Report* at 12. That score is then increased or decreased to account for the harm caused by the offense and the culpability of the offender. *See id.* at 13. The Commission "has used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offenses, analysis of various crimes' economic impacts, and medical and psychological data on the harm caused by drug trafficking, sexual assaults, pollution, and other offenses." *Id.*

In short, the Commission has continually measured its policies against the purposes of punishment. For example, the *Guidelines Manual* addresses how the criminal history rules are designed to address all four purposes of punishment. *See* USSG Ch. 4 intro. cmt.; *id.*, App. C, amend. 617 (increasing penalties in high-level fraud offenses because of the seriousness of offender culpability, but decreasing sentences for lower-level frauds to enhance the likelihood that the defendant will provide restitution).[18]

(1992) ("The guidelines strike an appropriate balance between the[] competing concerns [reflected in the four purposes of sentencing] in attempting to achieve the ends Congress envisioned in establishing the Sentencing Commission.").

[18] Other official Commission publications reflect that the Commission remains cognizant of its obligation to consider the four purposes of sentencing when promulgating guidelines. *See, e.g., Mandatory Penalties Report* at 18 ("The [Commission] will use its substantial research authority to examine the effects of sentencing guidelines on the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), and such topics as deterrence, recidivism, and selective incapacitation.") (footnotes omitted); *Fifteen-Year Report* at 12-13 (discussing how the Guidelines reflect the statutory purposes of punishment).

E. The Guidelines Reflect The Kinds Of Sentences Available

Section 3553(a)(3) instructs the sentencing court to consider the kinds of sentences available. Congress was concerned that "prison sentences are imposed in cases where equally effective sentences involving less restraint on liberty would serve the purposes of sentencing." S. Rep. No. 98-225, at 77. Of equal concern to Congress, however, was the likelihood that "some major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses." *Id.*; *see also* 28 U.S.C. § 994(m).

In producing the Guidelines, the Commission considered the kinds of sentences available. Its staff traveled across the Nation to obtain information and advice from states and communities in which a variety of sentencing options other than imprisonment were being used. *See supra* pp. 7-9. The Commission incorporated its consideration of the kinds of sentences available into the Sentencing Table directly, by the creation of Zones A through D. *See* USSG Ch. 5, Pt. A. Specifically, a court may sentence offenders in Zone A to probation only or to probation with various confinement conditions, such as intermittent confinement, community confinement, or home detention. For offenders in Zone B, some type of confinement condition is recommended, but it may be entirely intermittent, community, or home confinement accompanied by probation. By contrast, for offenders in Zone D, a term of imprisonment equal at least to the minimum of the Guidelines range is recommended. That incremental escalation of penalties based on offense level and criminal history is an entirely reasonable implementation of Congress's directive to consider the types of sentences available.

F. The Guidelines Reduce Unwarranted Sentencing Disparities

Section 3553(a)(6) instructs the sentencing judge to consider "the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct." Congress directed the Commission to consider the same factor. *See* 28 U.S.C. § 991(b)(1)(B). Petitioners and their *amici* argue, however, that the Guidelines do not sufficiently reduce disparity in sentences.

1. The best empirical evidence from the pre-*Booker* era refutes that claim. A "convergence of findings by researchers both inside and outside the Commission" showed that the Guidelines had reduced judge-created disparity: "The conclusion is clear: the federal sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion." *Fifteen-Year Report* at 99 (citing Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L. & Criminology 239 (1999), and James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & Econ. 271 (1999)).

2. In focusing on disparities like the crack/powder ratio, petitioners misapprehend the intended purpose of § 3553(a)(6), which was to reduce *unwarranted* disparity. Critically, the crack/powder disparity was established by *Congress*. The unwarranted disparity of which Congress spoke in § 3553(a)(6) was not *congressionally mandated* disparity, such as crack/powder disparity, or disparity created by congressionally mandated "fast track" programs (*see* USSG § 5K3.1), but rather the disparities that arose between and among individual sentencing judges.

Congress defined unwarranted sentencing disparity in the Act: "defendants with *similar criminal records* found guilty of *similar criminal conduct* receiv[ing] *dissimilar* sentences." II USSC, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 269 (Dec. 1991) ("*1991 Report*") (citing 28 U.S.C.

§ 991(b)(1)(B)). Congress was particularly concerned about the disparity created when "judges sentence on the basis of their personal criminal philosophies and assign different weights to such factors as a defendant's criminal history, role in the offense and use of a weapon." *Id.* at 273. "[T]he disparity found to characterize federal sentencing was thought to sometimes mask, and be correlated with, discrimination on the basis of a defendant's race, sex, or social class." Nagel, *Structuring Sentencing Discretion* at 883-84; *see id.* at 884 ("For a system claiming equal justice for all, disparity was an inexplicable, yet constant source of embarrassment.").

Just as Congress has mandated different sentences for different types of cocaine, it has imposed mandatory-minimum penalties for certain offenses.[19] Thus, in certain cases, Congress has mandated disparate treatment of offenders with similar criminal records who engage in seemingly similar criminal conduct. But, when "[d]isparity . . . [has been] deliberately created by [Congress] for public policy reasons," II *1991 Report* at 273, that disparity cannot be considered *unwarranted* within the meaning of § 3553(a)(6). When sentencing a defendant, the judge's consideration of unwarranted disparity under § 3553(a)(6) should be limited to the disparity defined by Congress in the Act. Defendants with similar criminal records found guilty of similar criminal conduct should

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[19] The Commission does not necessarily share Congress's policy preferences. The Commission has long opposed mandatory minimum sentences and has counseled Congress that the requirement of such penalties undercuts the goals of the Act. *See Mandatory Penalties Report* at 33-34. The Commission has also repeatedly recommended to Congress that it change the current cocaine sentencing scheme. *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) (as directed by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796); USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997) (as directed by Pub. L. No. 104-38); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002). The Commission's work in this area continues during the current amendment cycle.

receive similar sentences, except when (as in the case of crack/powder) Congress has provided otherwise.

3. NYCDL argues (at 19-20 (*Rita*, No. 06-5754)) that the Guidelines do not adequately address the need to reduce regional disparity. NYCDL bases this argument on a mischaracterization of the Commission staff's *Fifteen-Year Report*. Although the *Fifteen-Year Report* acknowledges that regional disparities exist, the report explains that those disparities often resulted from *circumvention* of the Guidelines at the pre-sentencing stages. *See Fifteen-Year Report* at 88-89. To the extent that the disparity that NYCDL identifies results from a failure to follow the Guidelines, it provides no basis for concluding that Guidelines sentences are not presumptively reasonable.

Even the "most troubling" evidence of regional disparity noted in the *Fifteen-Year Report* – namely, that the impact of the offender's city on his sentence had increased since the implementation of the Guidelines, *see id.* at 98 – cannot readily be ascribed to the Guidelines. The studies that identified the correlation between city and sentence coincided with another major policy shift. In the ADAA, Congress – and in turn the Commission – placed a far greater emphasis on drug quantity in determining the sentence. *See* 21 U.S.C. § 841(b). Because drug cases "are not randomly assigned to cities," Congress's emphasis on quantity risked creating "greater disparity between small cities and large cities, which are distribution centers for larger quantities." *Id.*

In any event, most regional disparities result from the exercise of prosecutorial discretion, for reasons that are readily understandable. A drug bust recovering 20 pounds of marijuana may grab prosecutors' attention in rural South Carolina, whereas in Brooklyn the case may not be treated as extraordinary. Even once charges are brought, the plea bargaining process presents ample opportunity to avoid the Guidelines' goal of "real offense"

sentencing by permitting compromises on facts such as drug quantity or amount of loss.[20]

In response, the Commission has recommended that judges accept only those pleas that "adequately reflect the seriousness of the actual offense behavior . . . [such that] accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." USSG § 6B1.2(a). And the Guidelines' "relevant conduct" rule provides that all of the defendant's acts or omissions in the same course of criminal conduct be considered, regardless of whether such conduct is charged. *Id.* § 1B1.3. Yet these policy levers have their limits. Judges may often be willing to accept plea agreements to move their docket along, and appeals from such cases are rarely taken. Although the pre-sentence report contains an independent investigation of the facts surrounding an offense, ultimately judges may be reluctant to second-guess the government's view of what charges it could readily prove at trial. Thus, to the extent those disparities are unwarranted, the Commission has taken reasonable measures within its power to reduce them.

CONCLUSION

For the foregoing reasons, an appellate court's according of a presumption of reasonableness to a Guidelines sentence is consistent with *Booker*. After *Booker* severed the standard of review in 18 U.S.C. § 3742(e), courts of appeals correctly accord such a presumption.

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[20] As the Commission has noted, mandatory minimum penalties exacerbate the effects of charge bargaining on sentence disparity because the charge itself dictates the penalty. *See Fifteen-Year Report* at 90-91. For example, 18 U.S.C. § 924(c), which punishes the use of a firearm in furtherance of a drug trafficking offense, carries a mandatory minimum five-year term, to run *consecutively to* the sentence for the underlying offense. Not surprisingly, § 924(c) counts raise the potential for disparity between prosecutors who frequently charge and bargain them away and those who do not. But that disparity, which results from the choices of Congress and prosecutors, cannot be considered *unwarranted* disparity within the meaning of § 3553(a)(6).

Respectfully submitted,

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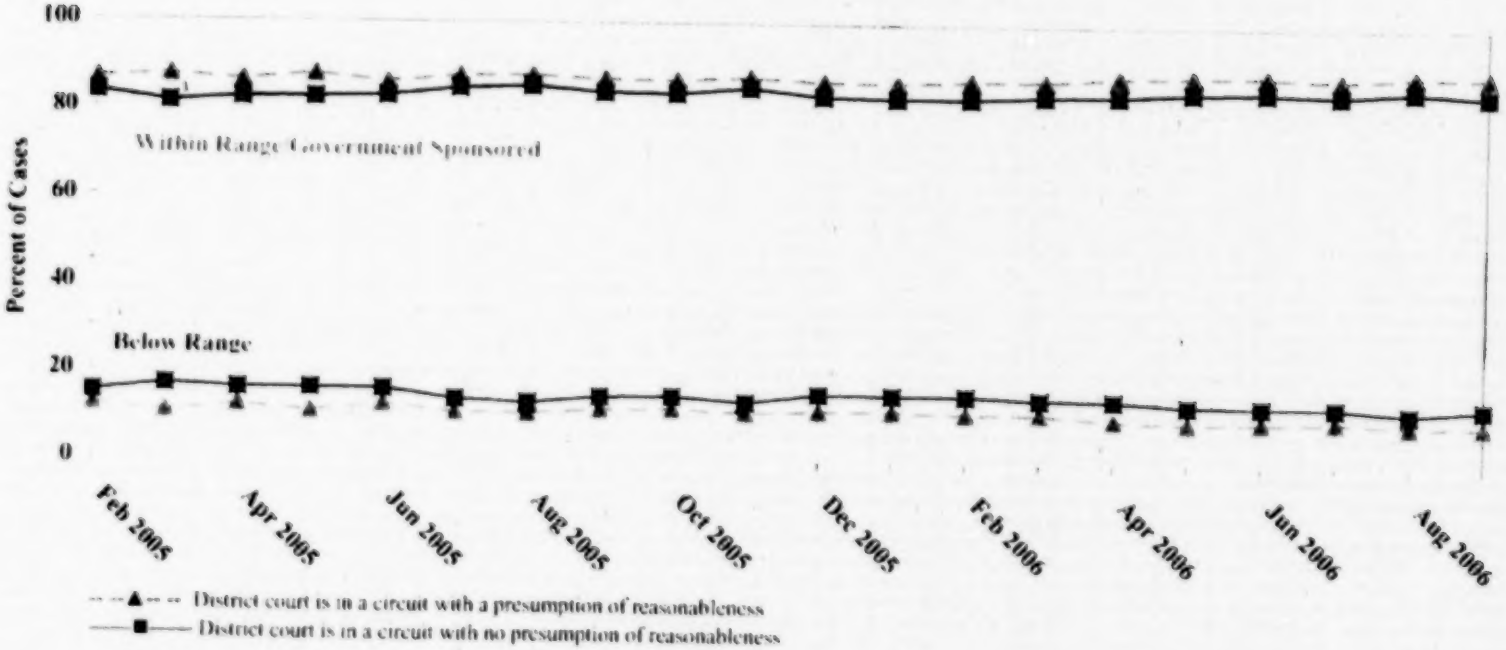
January 22, 2007

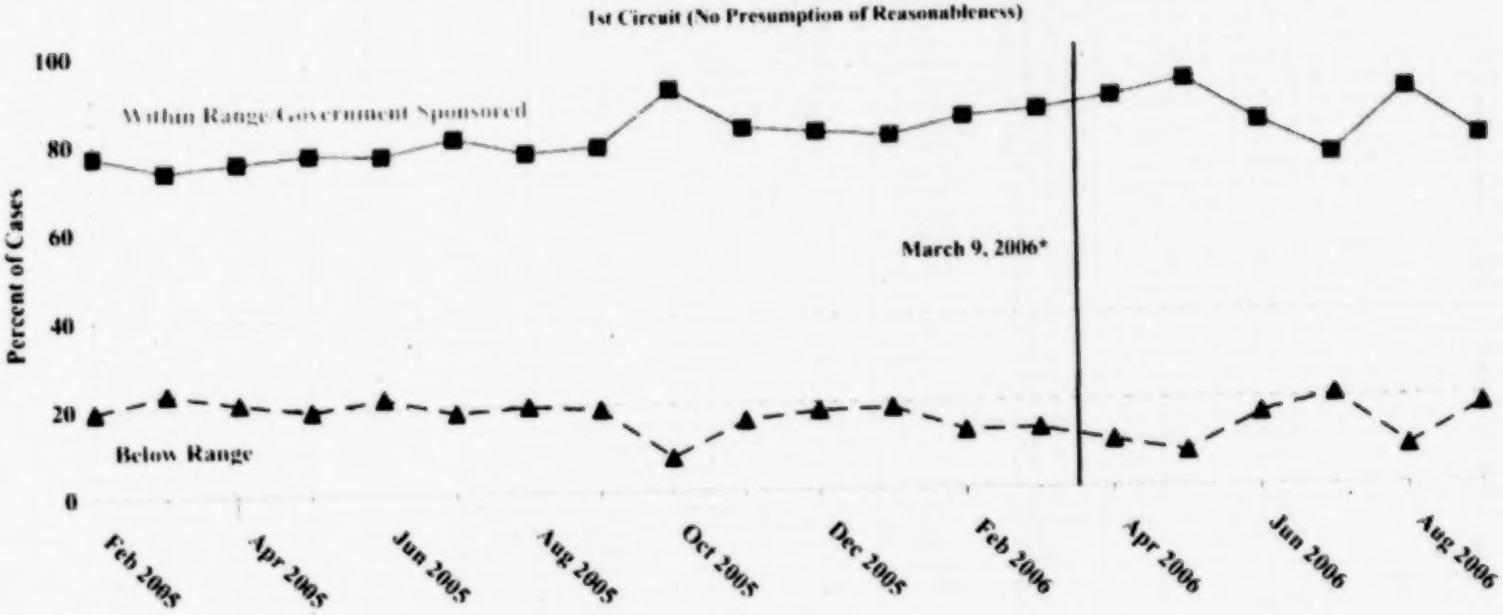
APPENDIX

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT AGGREGATED BY CIRCUIT DECISION
(February 1, 2005, through September 30, 2006)



SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Jiménez-Beltre*, 440 F.3d 514 (1st Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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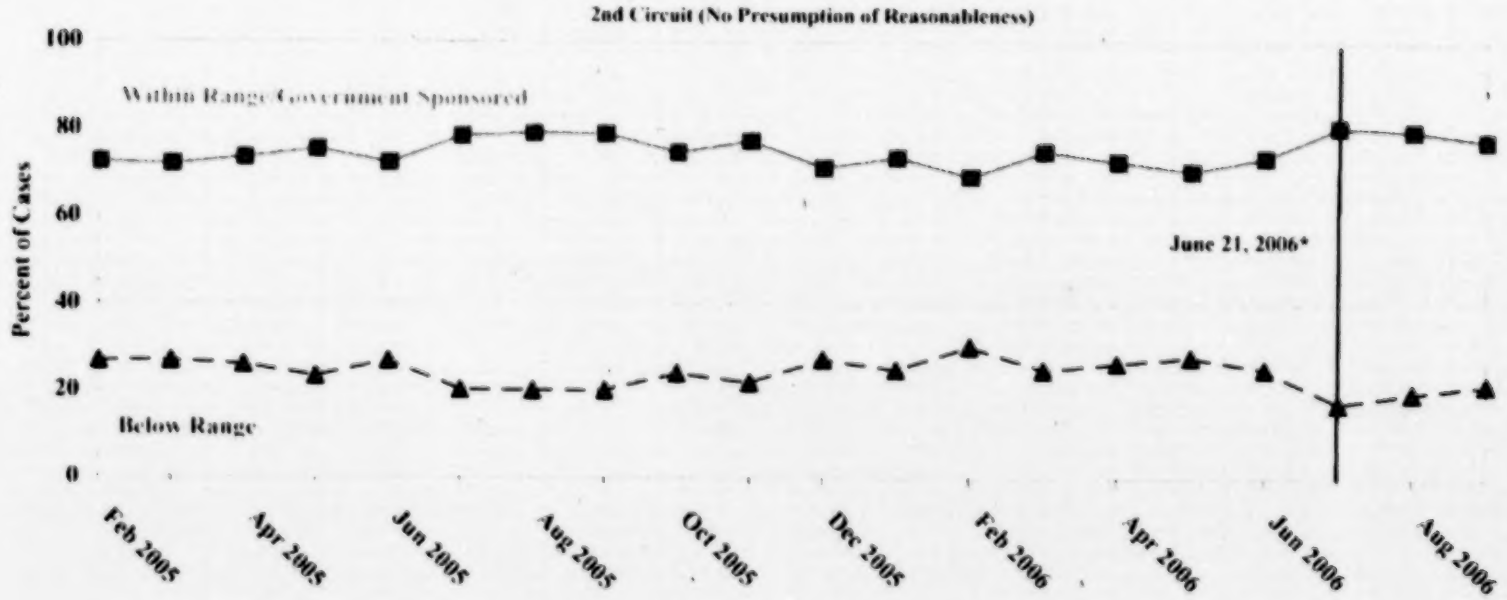
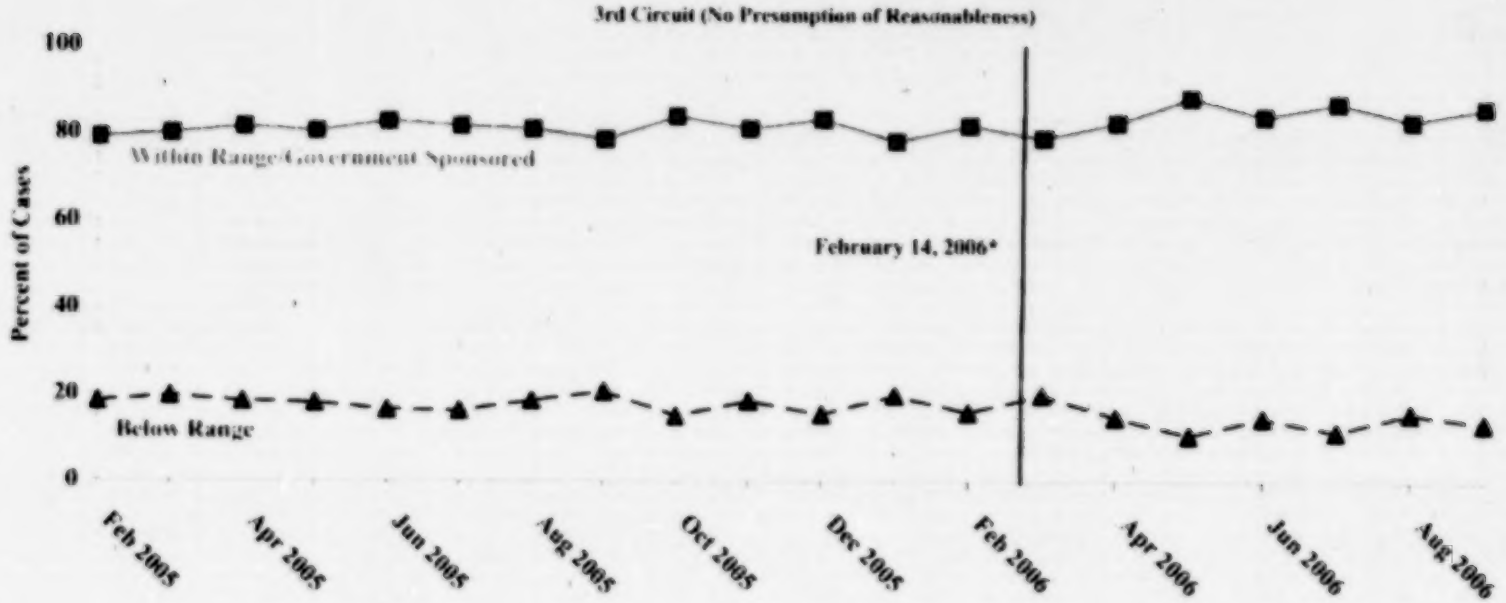
(February 1, 2005, through September 30, 2006)



**United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

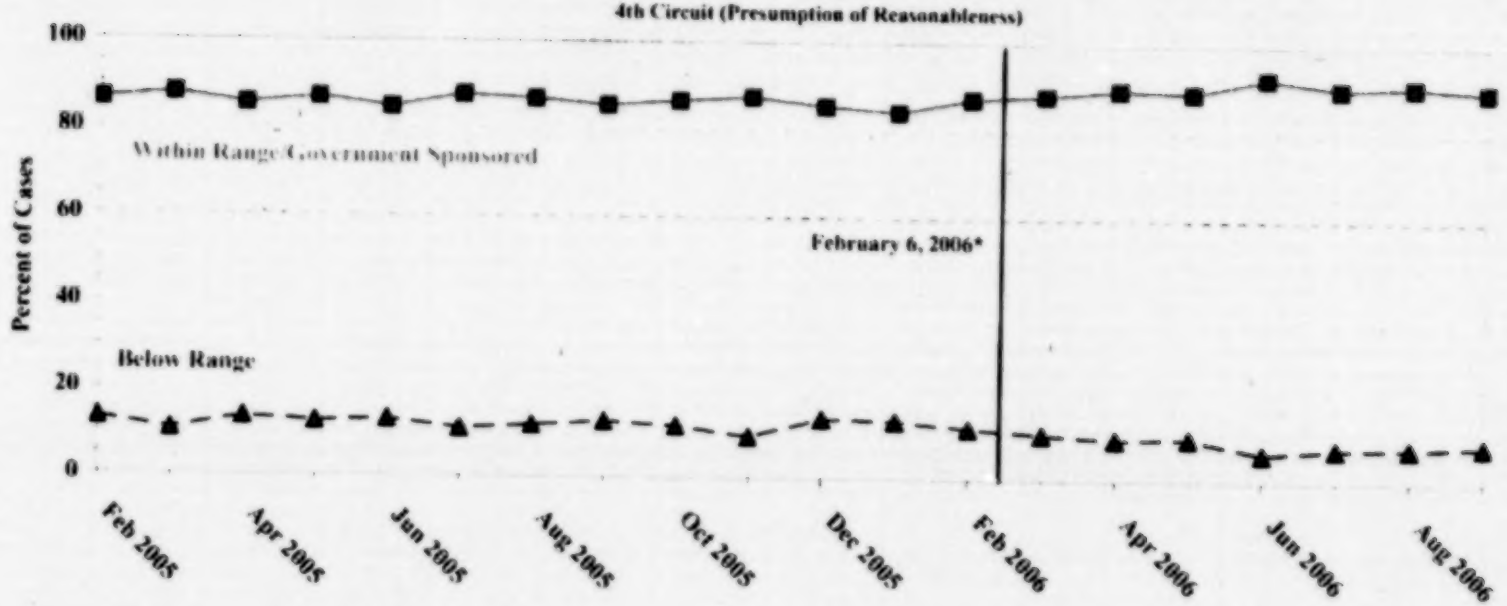
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Cooper*, 437 F.3d 324 (3rd Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

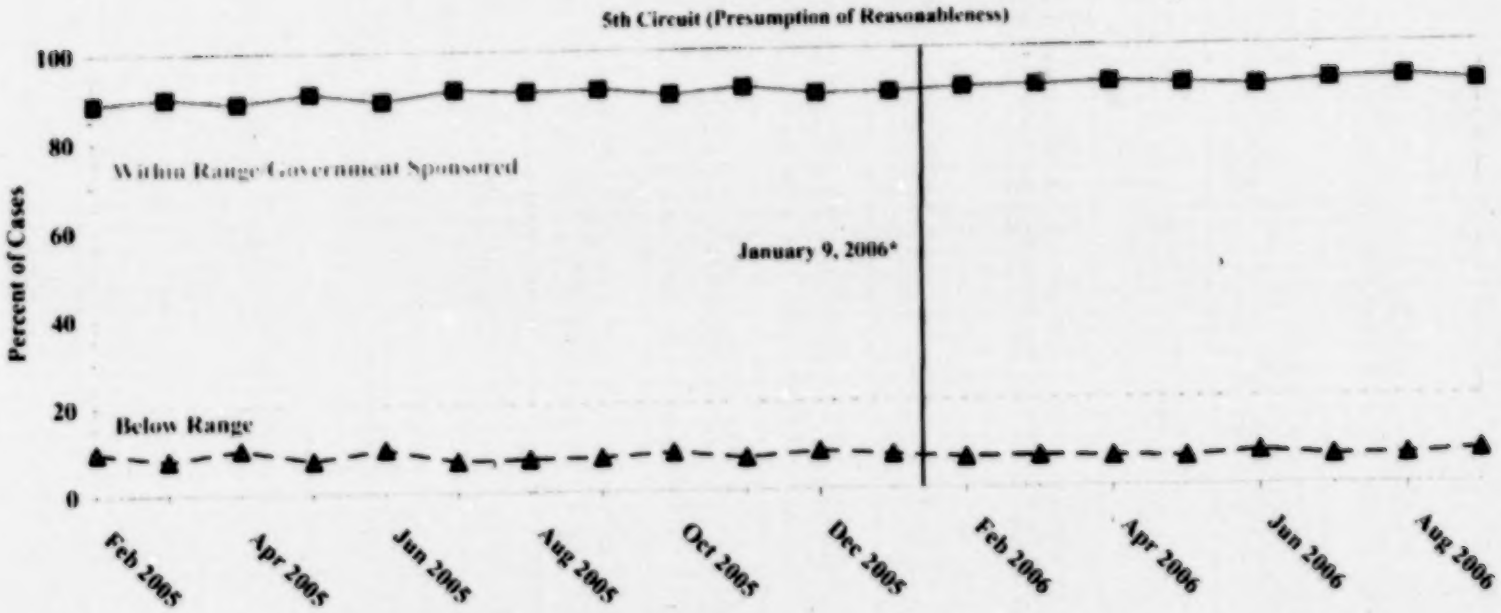
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Green*, 436 F.3d 449 (4th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Alonzo*, 435 F.3d 551 (5th Cir.2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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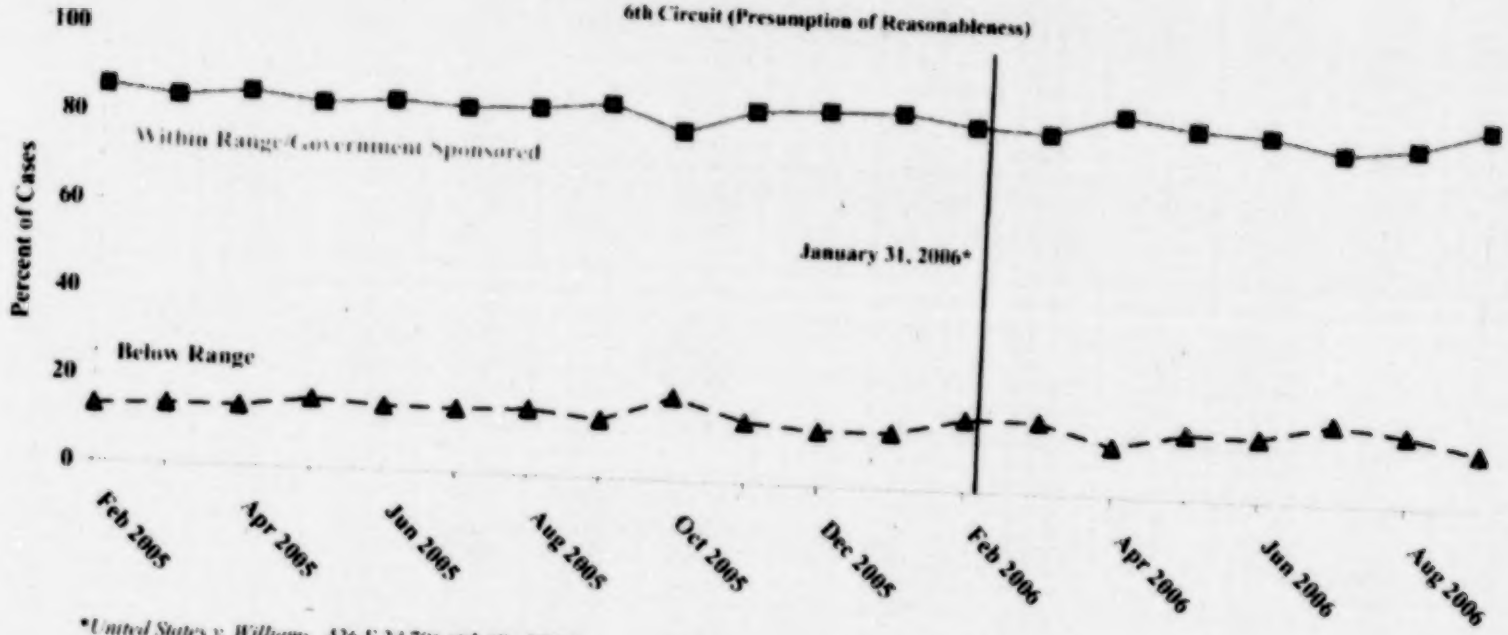

**United States v. Williams*, 436 F.3d 706 (6th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

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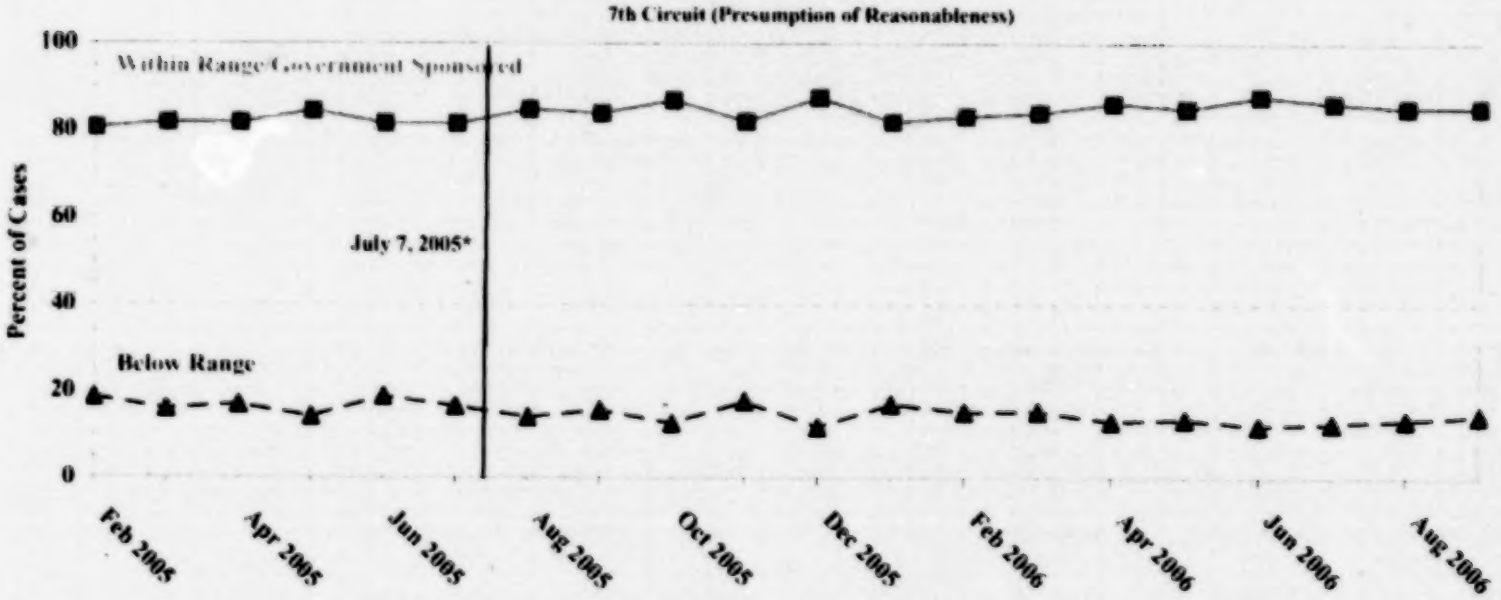

**United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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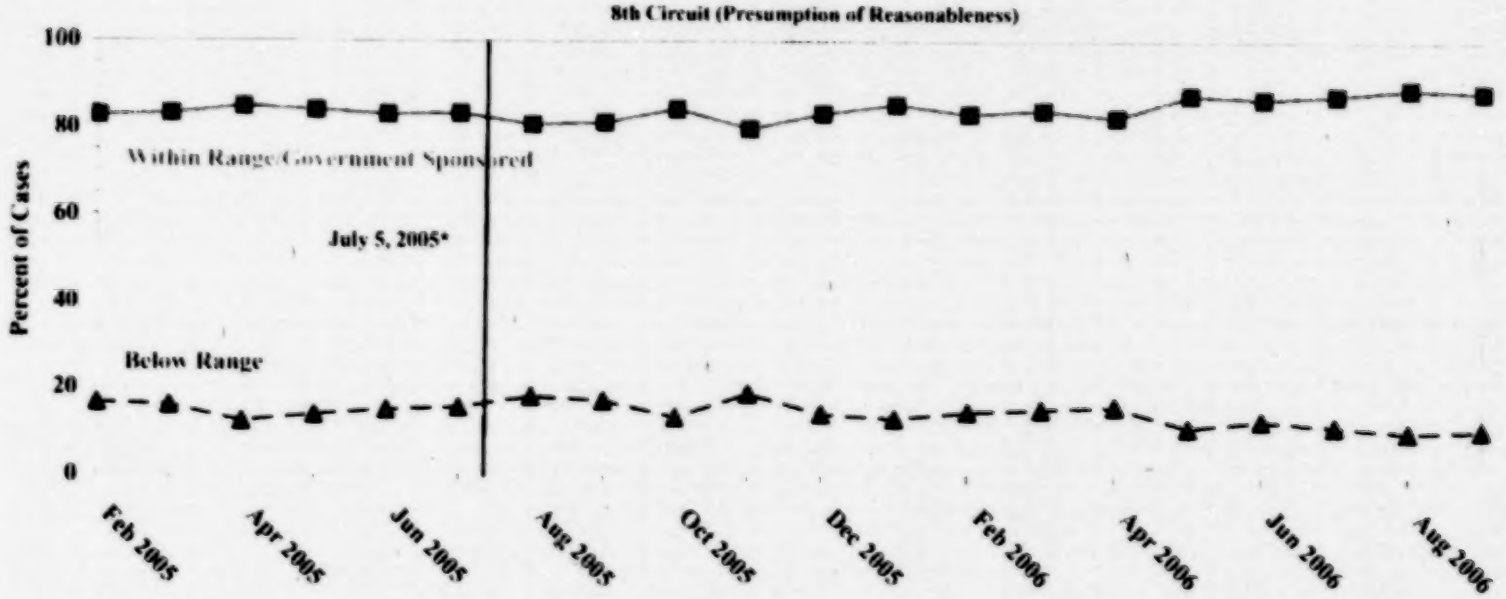

**United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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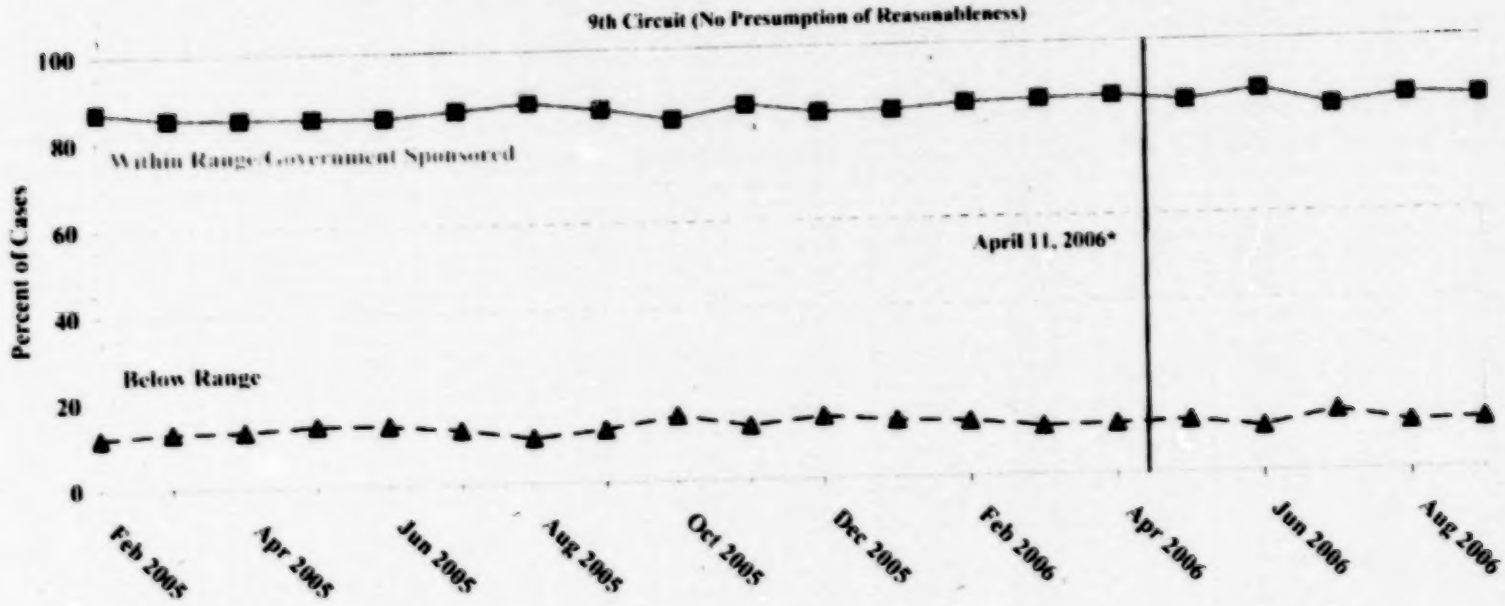

**United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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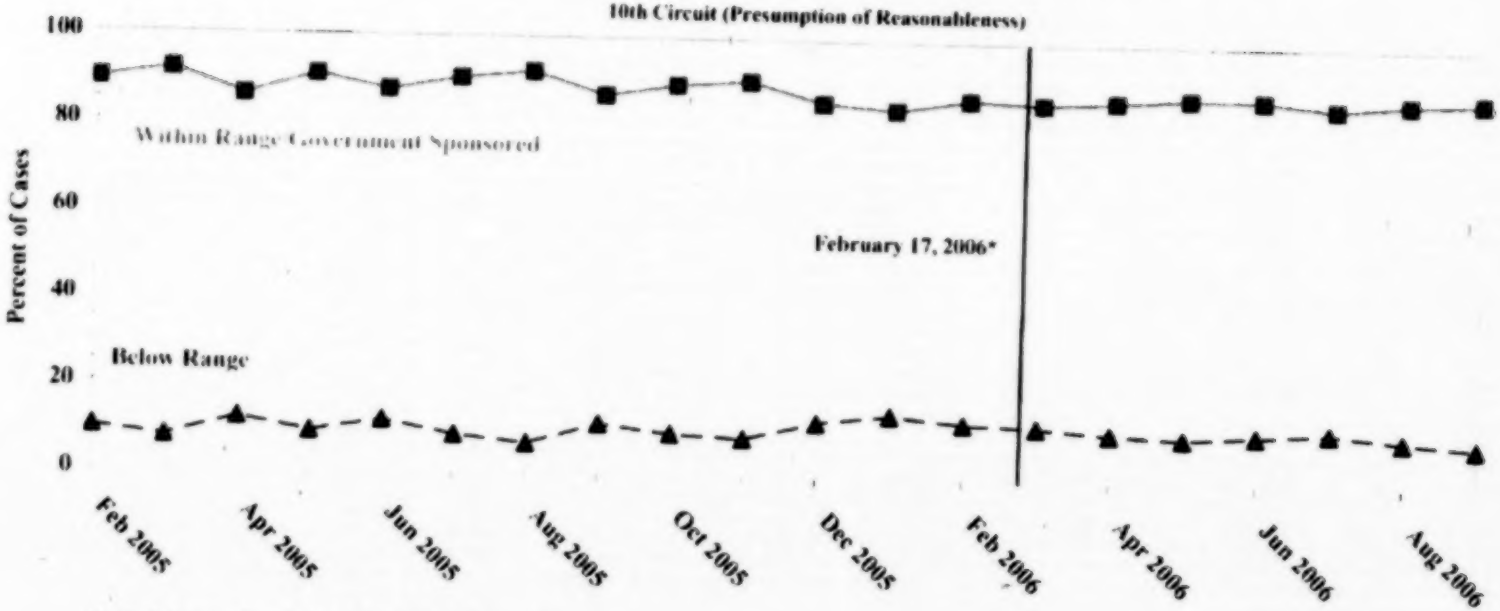

**United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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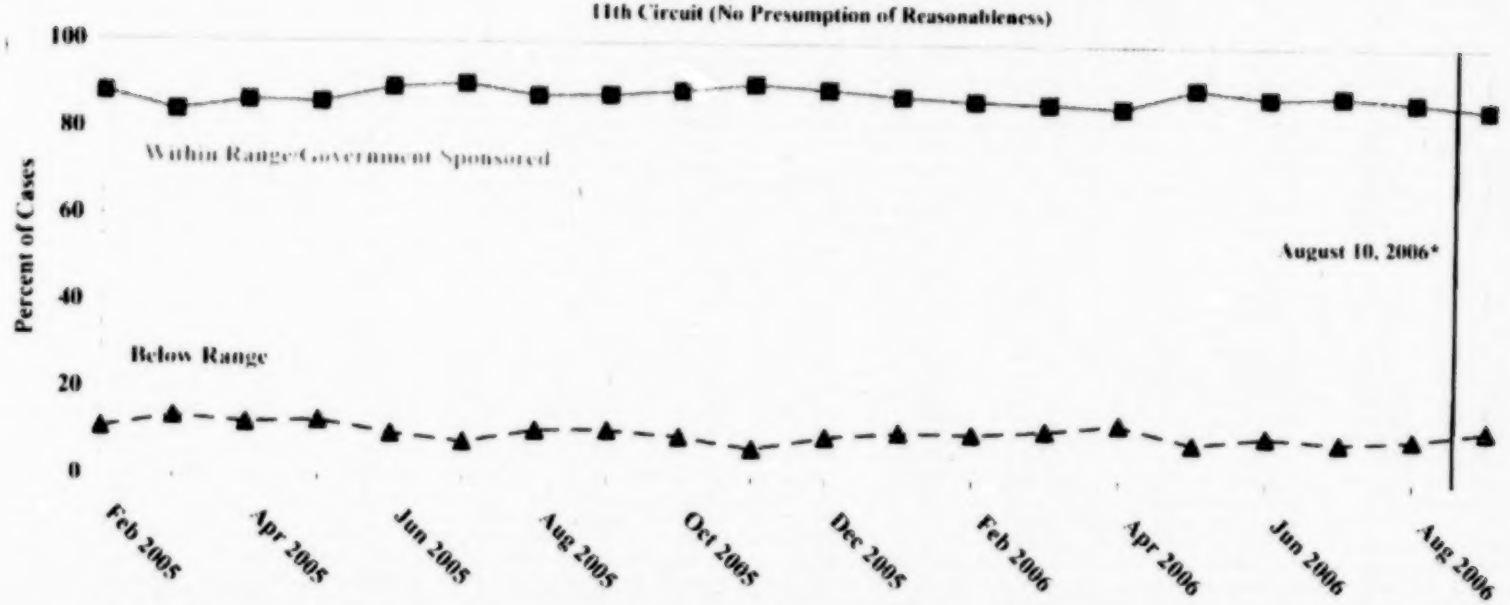

**United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

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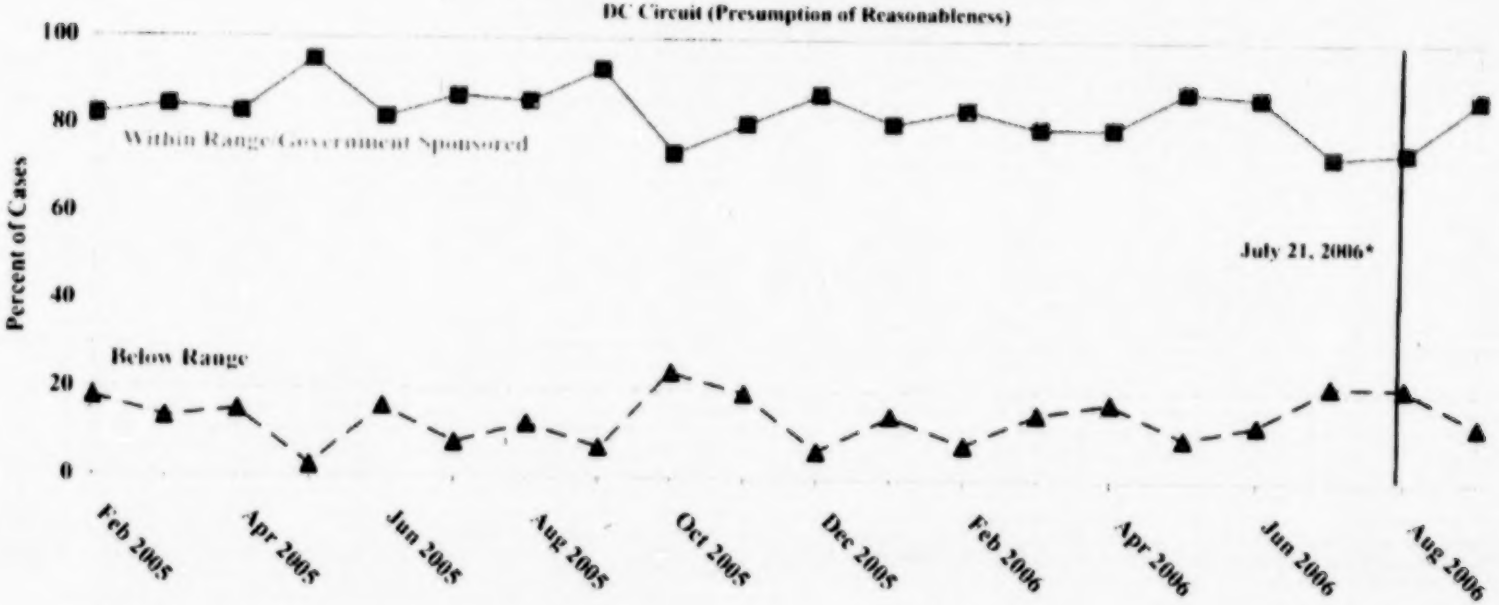

**United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

Methodology for Appendix

The charts in this appendix are based on data from all federal cases where the sentence was imposed from February 1, 2005, through September 30, 2006, and which was received, coded, and edited by the United States Sentencing Commission by November 27, 2006. It excludes data from cases where the sentence was above the applicable sentence range provided by the United States Sentencing Commission's *Guidelines Manual* or where the relationship between the sentence and the Guidelines range could not be determined due to missing information. Cases are divided into two groups: (1) cases where the sentence imposed was either within the Guidelines range or below the range but sponsored by the government, and (2) cases where the sentence was below the Guidelines range.

During this period, 12 of the United States Courts of Appeals rendered decisions as to whether sentences within the Guidelines range were presumed reasonable. As used in the appendices, the term "presumption of reasonableness" means that the sentence was imposed by a district court in a circuit where the court of appeals held that sentences within the Guidelines range are presumed reasonable. The term "no presumption of reasonableness" means that the sentence was imposed by a district court in a circuit where the court of appeals held that sentences within the Guidelines range are not presumed reasonable.

On chart 1, all sentences from a district court falling into the two categories discussed above are displayed by month. Data are grouped based on whether the court of appeals for the circuit to which a district court belongs decided that a sentence falling within the Guidelines range was presumptively reasonable. Cases are aggregated in this manner regardless of when the circuit court decision was issued during the period. For example, on July 21, 2006, the United States Court of Appeals for the District of Columbia held that the Guidelines were presumptively reasonable; therefore, all sentences from the

district court in that circuit that were below the Guidelines range are included in the group of cases represented on chart 1 on the line that is labeled "Below Range" and which contains the triangle symbol (which indicates a "presumption of reasonableness").

The remaining charts display the district court sentences by month over the period discussed above, sorted by the circuit to which the district court belongs. On these trend charts is a vertical line at the point where the court of appeals for that circuit issued its decision as to the presumptive reasonableness of sentences within the Guidelines range. Next to the line is the date of that decision.

084C

Nos. 06-5618 and 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

VICTOR A. RITA, *Petitioner,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: December 18, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government, separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment approximately 20 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines. WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in an open and transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In particular, WLF has been critical of the Guidelines and their application because they mandate excessively harsh prison sentences, particularly with respect to minor regulatory infractions. In addition, WLF filed a brief in *United States v. Booker*, 543 U.S. 220 (2005) and

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[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than *amici* and their counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

in other Sentencing Guideline cases in lower courts, arguing that the Guidelines are unconstitutional, flawed, and generate unreasonably harsh sentences and aggravate disparity. *See, e.g., Thurston v. United States*, 358 F.3d 51 (1st Cir. 2004).

In addition, WLF's Legal Studies Division publishes relevant articles on criminal law and sentencing issues. *See, e.g.*, Brian M. Heberlig, *Avoiding Disparities Between Sentences Of Co-Defendants Is A Legitimate Sentencing Goal* (WLF Legal Opinion Letter, Apr. 7, 2006).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae* along with WLF in numerous cases, including *Booker* and *Thurston*.

INTRODUCTION AND SUMMARY OF ARGUMENT

"My object all sublime,
I shall achieve in time --
To let the punishment fit the crime --
The punishment fit the crime;"

Gilbert & Sullivan - The Mikado

Letting the "punishment fit the crime" has long been a sentencing policy goal in civilized societies. But this is only half of the equation, for the punishment must also fit the offender. Congress mandated that sentencing judges, when considering what punishment to impose in a particular case, carefully consider the nature and circumstances of the offense *and* the characteristics of each individual offender,

as well as all the other sentencing factors specified in 18 U.S.C. § 3553(a).

The overarching goal of sentencing is to select and impose a just punishment that achieves the principles of deterrence, retribution, and rehabilitation. Congress mandated, however, that the sentence ultimately imposed be one that "is sufficient, but not greater than necessary" to achieve the purposes of punishment. *Id.* This so-called "parsimony principle" forbids a civilized society from inflicting gratuitous punishments on its citizens.

The Sentencing Reform Act of 1984 altered sentencing policy in two major ways. First, it abolished the parole system and established a determinate sentencing scheme. No longer would a convicted prisoner be eligible for parole, usually after serving one-third of the sentence originally imposed by the court. Second, the Act created the Sentencing Commission, which devised a set of rigid Guidelines that sentencing courts were required to follow in determining a sentence. 18 U.S.C. § 3553(b). Sentences imposed under the Guidelines often resulted in excessive punishments that fit neither the crime nor the offender, thereby doing great violence to the parsimony principle.

In order to comply with the harsh dictates of a Guideline sentence, courts would sometimes be forced to "stack" the sentences for multiple charges, making them consecutive instead of concurrent, in order to meet the Guideline result. In other cases, the Guideline sentence was so severe that it exceeded the statutory maximum sentence permitted, thereby requiring the court to lop off the end of the Guideline sentence to fit the statute's maximum term. This Procrustean approach to sentencing fundamentally altered the principle of letting the punishment fit the crime;

instead, the Guidelines effectively forced the crime to fit the punishment, aided and abetted by overzealous prosecutors engaged in questionable plea bargaining practices.

Just as Theseus eventually killed Procrustes, this Court struck down the mandatory feature of the Guidelines as unconstitutional under the Sixth Amendment in *United States v. Booker*, 543 U.S. 220 (2005). Henceforth, the Guidelines would be only one of several factors to be considered by a sentencing court in deciding what sentence to impose, keeping in mind Congress's overarching command to follow the parsimony principle. However, several courts of appeals have since attempted to resurrect the Guidelines by giving them a presumption of reasonableness that would effectively make them mandatory, and thus, inconsistent with *Booker* and the parsimony principle. The primary questions before the Court in this pair of cases are whether sentencing courts should regard a Guideline sentence as "presumptively reasonable," and if so, whether substantial variance from that sentence needs to be justified by extraordinary circumstances. *Amici* submit that the answers to both those questions are emphatically no.

The reason why the Guidelines often generate excessive sentences is primarily due to design defects in their promulgation, as even the Commission itself has acknowledged. All of the sentencing factors of § 3553(a) were not fully taken into account, particularly those regarding offender characteristics, nor could they be. Under the Guidelines, no longer could judges fully consider a defendant's personal situation, family responsibilities, education, health status, military service, charitable and community service activities, and the like, as they did prior to the promulgation of the Guidelines. The "one-size-fits-

all" approach of the Guidelines, which purportedly were designed to reduce unwarranted sentencing disparity, often caused more of it.

More significantly, the Guidelines are fundamentally flawed because they regularly dictate prison terms that are several times longer than terms actually served in the pre-Guideline era for the same offense. Because parole has been abolished, no longer will offenders be able to be released after serving one-third of their time. Thus, the Guidelines fly in the face of Congress's directive that they were to generally reflect the average sentence *actually served* in the pre-Guideline era. More importantly, the Guidelines directly violate Congress's directive, 28 U.S.C. § 994(j) -- that probation be the norm for non-violent first offenders -- by greatly reducing the availability of probation and other non-prison punishments for those categories of defendants. The Commission never adequately explained this radical departure from the pre-Guideline sentencing practice.

Therefore, in order to properly compare the length of pre- and post-Guideline sentences, any sentence imposed under the Guidelines should be multiplied by a factor of three in order to get a good sense of what that sentence would have been in a pre-Guideline era, thereby enabling one to gauge whether the Guideline generated sentence is a fair and reasonable one. For example, Petitioner Rita, a first-offender, father, and distinguished military veteran of two wars suffering from serious medical problems, was given a Guideline sentence of 33 months for the non-violent offense of making two false statements before a grand jury with regard to his purchase of a "parts kit" for a vintage World War II replica rifle. Since he will be required to serve almost all of that time, his 33-month sentence is

comparable to a 99-month pre-Guideline sentence, or a little over eight years. That is so because Mr. Rita would most assuredly have been paroled after serving one-third of that time (assuming he would not have received probation). It is hard to imagine that *any* judge in the pre-Guideline era would have sentenced Mr. Rita to prison for eight years. Mr. Rita's sentence is simply unreasonable by any standard.

Similarly, Petitioner Claiborne, also a first-offender, plead guilty to a very minor drug offense, and was given a below-Guidelines sentence of 15 months, which translates into a pre-Guideline sentence of 45 months, or almost 4 years. Yet the court of appeals declared this sentence too lenient, in light of the 37-month sentence called for by the Guidelines -- a sentence which translates into a pre-Guideline prison term of 111 months, or a little over 9 years. The district court's choice of a below-Guidelines sentence for Claiborne was clearly reasonable, and its reasons for imposing the sentence were valid ones that comported with the parsimony principle.

Accordingly, because of these systemic design flaws in the Guidelines and the results they have produced, they are hardly worthy of a presumption of reasonableness; if anything, the opposite is true. At most, they should be regarded as just one of several factors in § 3553(a) that a judge, using his or her informed discretion and judicial expertise, should consider, without giving the Guidelines any special or presumptive weight. Concomitantly, there should be no necessity of demonstrating extraordinary circumstances to justify imposing a lower sentence than the one called for by the Guidelines.

Finally, *amici* submit that sentencing courts should explain their reasons for imposing a sentence in order to

make it clear that they properly considered the sentencing factors in § 3553(a), thereby enabling a reviewing court to determine whether the sentence is reasonable both procedurally and substantively.

ARGUMENT

I. THE GUIDELINES DO NOT WARRANT A PRESUMPTION OF REASONABLENESS BECAUSE THEY ARE DESIGNED TO SYSTEMATICALLY GENERATE UNREASONABLE SENTENCES THAT VIOLATE THE PURPOSES OF SENTENCING.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in paragraph (2) of this subsection," *viz.*, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general] deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." (emphasis added). The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the parsimony principle, an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens.

Congress also commanded that in determining the appropriate sentence, the judge must consider six other sentencing factors, including the appropriate Sentencing

Guideline, 18 U.S.C. § 3553(a)(4), and any pertinent policy statement issued by the Sentencing Commission, § 3553(a)(5).[2] *All* the factors listed must be considered by the Court; no special weight is required to be given to the Guidelines or any Commission policy statement. The end result must be a sentence carefully chosen that is sufficient, but not greater than necessary, to serve the purposes of sentencing specified in § 3553(a)(2).

One of the rationales for the Sentencing Reform Act of 1984 was the perception that judges' broad sentencing discretion resulted in a fragmented sentencing system that produced unwarranted disparity in sentences and a lack of fairness. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-3373.[3]

---

[2] The other four factors specified in 18 U.S.C. § 3553(a) that must be considered by the sentencing court are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (3) the kinds of sentences available;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

[3] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines apparently were minor or statistically insignificant and not based on impermissible factors such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id.* at 111.

The Sentencing Reform Act abolished parole and established a determinate sentencing scheme whereby the sentence that was imposed was essentially the sentence served. Wholly independent of that reform, Congress also established the Sentencing Commission to promulgate Sentencing Guidelines that would effectively dictate the sentence, within a narrow range, to be imposed on a defendant convicted of a federal offense. 18 U.S.C. § 3553(b). In so doing, application of the Sentencing Guidelines under § 3553(b) in a particular case would trump any sentencing decision reached solely after considering the seven factors in § 3553(a), even if the resultant Guideline sentences were unduly harsh (as they often were), and in clear violation of the parsimony principle.

All of that changed when this Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights, and as a remedy, excised 18 U.S.C. § 3553(b). In so doing, the Court deleted the mandatory feature of the Guidelines, thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines are to be simply one of seven factors a sentencing court must consider in fashioning a just sentence.

Contrary to the courts of appeals in these instant cases, *amici* submit that a Guideline sentence should not be given any "presumption of reasonableness" or any other special weight, because doing so would make the Guidelines effectively mandatory rather than advisory, contrary to *Booker*. Moreover, they should not be regarded as presumptively reasonable because the Guidelines themselves have structural design flaws that regularly produce harsh sentences in clear violation of the parsimony principle that the sentence "be sufficient, but not greater than necessary"

to serve the purposes of sentencing. Accordingly, there should be no need to show extraordinary circumstances when a judge imposes a below-Guideline sentence. All that is required is a statement of reasons explaining the sentence in light of the § 3553(a) factors.

A. The Guidelines Are Designed To Produce Excessively Harsh Sentences Compared to Sentences Imposed in the Pre-Guideline Era.

The fundamental defect with the Guidelines is that they were drafted without hewing to Congressional commands. Congress intended that "for the most part the average time served [under the Guidelines] should be similar to that served today in like cases." S. Rep. No. 225, *supra*, at 116. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988) (Guidelines were primarily to be based on "typical, or average, actual past practice"). In addition, Congress directed the Commission to develop the Guidelines to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).[4] Thanks to the flawed Guidelines, our nation's

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[4] The history of this provision suggests that prison was to be used for the principal purpose of incapacitation (specific deterrence) or retribution where the defendant would be a danger to the community if free to remain at large. 130 Cong. Rec. S542-43 (daily ed. Jan. 31, 1984) (remarks of Senator Nunn). Attorney General Alberto Gonzales apparently shares this view, having opined during his confirmation hearings that incarceration is best suited "for people who commit

prisons are overpopulated by inmates serving sentences that far exceed the typical or average sentence imposed and served in the pre-Guideline era, including sentences by first offenders who have been convicted of non-violent and minor offenses.

The source material allegedly utilized by the Commission in determining past sentencing practices was a 1,279 page report summarizing some 40,000 sentences imposed from January 1, 1984 to February 28, 1985. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986). In reviewing the sentences imposed for various categories of offenses, one is struck by how frequently probation was imposed in the pre-Guideline era, including the imposition of community service and fines, all of which properly reflect the goals of parsimony in meeting the purposes of punishment, as well as considering the "kind of sentences available" as required by § 3553(a)(3).[5] On the other hand, a probation sentence under the Guidelines is rarely an available punishment, even for first offenders. This occurs because the Commission structured the Guidelines in such a way that Base Offense Level scores

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violent crimes and are career criminals." Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General, as transcribed by Federal News Service, *accessed at* http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc

[5] For example, convictions for the non-violent crime of mail or wire fraud resulted in probation sentences in 57.5 percent of the cases. *Id.* at 3-250, Table 3-58. Many of these probation sentences included fines, community service, and restitution. For those convicted for making a false statement within the jurisdiction of a federal agency who had no prior convictions, 76 percent were given probation. *Id.* at 3-222, Table 3-75.

can be easily increased by adding Specific Offense Characteristics that take probation off the table as a sentencing option.[6]

More significantly, under the pre-Guideline parole system, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed, with inmates receiving their initial parole hearing within 120 days after incarceration. 18 U.S.C. § 4205(a) (repealed 1984). Indeed, for those inmates who were considered "very good" candidates for parole, and whose criminal offense level was a Category 3 or less, the customary total time to be served in prison before being paroled would be 10 months or less. *See* Paroling Policy Guidelines for Decisionmaking, 28 C.F.R. 2.20 (Parole Guideline chart attached hereto as App. 1a).[7] In short, even if Petitioner

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[6] According to a survey conducted by the Federal Judicial Center, 65.8 percent of the judges contacted indicated that the Guidelines do not appropriately identify offenders who should be eligible for alternatives to incarceration; 60.2 percent of Chief Probation Officers similarly agree. *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 101 (1997). In addition, 84.7 percent of the judges surveyed agreed that Congress should expand the so-called "safety valve" provision (18 U.S.C. § 3553(f) and USSG §5C1.2) so that *more* defendants would be eligible for sentence reductions under its provisions. *Id.* at 69. These views by experienced sentencing experts is further evidence of the structural design flaws of the Guidelines.

[7] For those crimes not listed in specific categories in the parole guidelines, the general rule is that for crimes where the maximum sentence is less than 2 years, the offense level is Category One; for statutes providing sentences from 2 to 3 years, the level is Category Two; and for sentences of 4 to 5 years, the level is Category Three. 28 C.F.R. 2.20, Chapter 12 Miscellaneous Offenses.

Rita had been sentenced to prison instead of probation in the pre-Guideline era, he likely would have been released after serving a minimal time of a few months since his offense would be no greater than a Category Three, and more likely a Category One.

Accordingly, sentences imposed under the Guidelines are roughly equivalent to pre-Guideline sentences that are *three times greater*. As previously noted, Petitioner Rita is a first-offender and distinguished military veteran who suffers from serious medical problems. He was sentenced to 33 months in prison for the non-violent offense of making two false statements before a grand jury with regard to his purchase of a "parts kit" for a vintage World War II rifle. Since he will be required to serve almost all of that time (minus nominal good time credits), his 33-month sentence is comparable to a 99-month pre-Guideline sentence, or a little over eight *years*. That is so because Mr. Rita would most assuredly have been paroled after serving one-third of that time. Surely, no judge would have sentenced Rita to prison for eight years in the pre-Guideline era. Rita's 33-month prison sentence is simply unreasonable by any standard. Similarly, Petitioner Claiborne's Guideline range was a prison sentence of 37 to 46 months. That sentence translates into a pre-Guideline prison term of 111 months to 138 months, or approximately 9 to 11 1/2 *years*. The district court imposed a much more reasonable below-Guideline sentence of 15 months, but even that translates into a very stiff 45-month pre-Guideline sentence. The court of appeals, giving the Guidelines presumptive weight, thought the lengthly sentence was too lenient.

Harsh sentences are thus common under the Guideline system and are unfairly imposed on those who

commit even minor regulatory offenses, particularly in the environmental area. In *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), for example, 97-month prison sentences were meted out to first offenders Robert Blandford and Abner Schoenwetter, hard-working seafood importers, and first offender Steven McNab, a Honduran seafood exporter, for the "crime" of violating the Lacey Act by importing frozen lobster tails from Honduras in clear plastic bags instead of cardboard boxes. This shipping practice violated an obscure Honduran regulation that the Honduran government argued was invalid and could not be enforced in its own country.

Those sentences translate into a mind-boggling pre-Guideline sentence of 297 months, or almost 25 years![8] In order to stretch the crime to make it fit the 97-month Guideline punishment (which was at the low end of the range), the sentencing court had to carve out a 37-month portion of a 60-month sentence from one of the charges, and stack it on top of a maximum 60-month sentence of another charge, and made them run consecutively, with the other counts running concurrently. *See* Blandford Pet. at 7; Pet. App. at 173a, No. 03-627, *cert. denied,* 540 U.S. 1177 (2004). Procrustes would have been happy.

These kinds of harsh sentences clearly violate the parsimony principle and every other sentencing factor in 18 U.S.C. § 3553(a), including the need "to promote respect for the law" as provided in § 3553(a)(2)(A). Neither the defendant nor society can have any "respect for the law" when the Guidelines mechanistically produce unduly harsh punishments. Indeed, the opposite is true; rigid Guideline

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[8] *See* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004).

sentences have been met with scorn and contempt by judges and the public alike.[9]

To be sure, Congress authorized the Sentencing Commission in 28 U.S.C. § 994(m) to depart from past sentencing practice if sentences were too lenient for serious crime, but Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988) (emphasis added). It appears that the Commission did not follow 28 U.S.C. § 994(m) which mandates that the Commission "ascertain the average sentences imposed" and the "length of such terms *actually served*" before jettisoning pre-Guideline sentencing norms. The record, however, is sparse as to the Commission's articulated reasons for departing from past sentencing practice. This is particularly true for sentences meted out for environmental infractions where the pre-Guideline practice was probation, remediation, community service,

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[9] Federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002 at 28 n.87 (collecting cases and other sources); *see also United States v. Green*, 346 F. Supp. 2d 259, 281 (D. Mass. 2004) ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . .").

and fines.[10] It appears that the Commission simply did not do all of its homework as required by Congress before sharply departing from past sentencing practice.[11]

When a statute clearly commands an agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. For example, in *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183 (D.C. Cir. 1990), the court was called upon to determine whether the EPA had properly followed Congressional directives in setting certain emission levels [compare to Guideline levels] and determining whether they were stringent enough [compare to the parsimony principle]. When it found the record to be barren, the court struck down the rule, stating, "We cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Id.* at 189 (emphasis added). *See also Chamber of Commerce v. Securities and Exchange Comm'n*, 412 F.3d 133 (D.C. Cir. 2005) (agency rule invalidated for not taking costs into

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[10] Where incarceration was imposed for minor environmental offenses in the pre-Guideline era, the length of the sentences were usually for a few weeks or months, coupled with fines and remediation, which adequately served the principles of punishment and deterrence. *See generally* U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver *Summary of Criminal Prosecutions Resulting From Environmental Investigations* (May 31, 1991) (summarizing disposition of all environmental criminal cases from fiscal years 1983 to 1991).

[11] *See also* Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers.

account as required by statute or considering alternatives). As this Court has stressed, courts must be sure that an agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

Here, the Guidelines are vulnerable from both a procedural and substantive challenge such as any other agency's rules. *See* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991); *id.* at 89 ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines"). In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, USSG §2J1.6, and remanded the case to the district court for resentencing as if the Guideline did not exist. The court did so because the Guideline in question was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the court concluded that the standard of review of agnecy regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

Amici submit that no *Chevron* deference is due the Commission's Guidelines; at most, they deserve only *Skidmore*-type deference. *Skidmore v. Swift & Co.*, 323

U.S. 134, 140 (1944) (agency ruling, "while not controlling upon the courts by reasons of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of the such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). In short, the Guidelines are only to be considered as one of several sentencing factors, without any presumption of reasonableness, or any requirement that extraordinary circumstances must be shown to justify a sentence that departs downward from them.

B. The Guidelines Are Flawed Because They Mandate Statutory Maximum Punishments In Violation of the Parsimony Principle.

Another major defect in the Guidelines is that in a number of cases, they require the sentencing judge to impose the statutory maximum sentence, despite all the other § 3553(a) factors counselling otherwise. This result clearly violates the parsimony provision, because the Guidelines call for a prison sentence greater than what Congress itself has declared should be the statutory maximum for the worst offender. Indeed, the Commission even contemplated that this bizarre result would occur by promulgating a specific application Guideline that would lop off any excess of the Guideline sentence that is greater than the statutory maximum. USSG §5G1.1(a).[12]

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[12] "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." USSG

A good case study of this troubling phenomenon is *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004). Mr. Thurston was charged with one count of conspiracy under 18 U.S.C. § 371 with respect to his company's medicare billing practice for laboratory blood testing. His co-defendant, who the district court found was the prime architect of the challenged practice, was offered a plea bargain that he accepted. He was allowed to plead nolo contendere, did not furnish any assistance to the government, and received three years of probation.

The government offered a similar plea deal to Thurston. Thurston rejected the offer because he believed he was innocent and committed no wrongdoing, and exercised his constitutional right to stand trial. Two defense expert witnesses testified at trial that the challenged blood testing practice as a lawful industry practice. *Id.* at 60. There was no allegation or finding that Mr. Thurston financially benefited personally from the company's billing practice, unlike the allegations of fraud and personal enrichment made in Enron-type cases. Nevertheless, a jury found him guilty of one count of conspiracy as charged. The maximum sentence allowed by law is five years or 60 months. 18 U.S.C. § 371.

Although the government readily accepted a probationary sentence as suitable punishment for the more culpable co-defendant, and thus tacitly acknowledged that it served the principles of punishment as provided by § 3553(a), the Guideline sentence for Thurston was computed as 78 to 97 months. But because the statutory maximum punishment was 60 months, the excess had to be trimmed to fit the statutory maximum. The district court departed

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§5G1.1(a).

from the Guidelines, and imposed a reasonable split six-month term -- three-months to be served in prison and three months to be served by home detention -- followed by 21 more months of supervised release. The court did so in order to avoid a gross disparity with the probation sentence given to the more culpable co-defendant, and because of Thurston's civic and charitable works. This reasonable sentence "outraged the prosecutors" and the government appealed. 358 F.3d at 55.

The First Circuit reversed, finding that the then mandatory Guidelines "bind us and they bind the district court," and therefore, downward departures for unwarranted disparities "in sentences among co-defendants was impermissible." *Id.* at 78. Mr. Thurston would have to return to prison and serve the maximum five years (which is effectively a pre-Guideline sentence of 15 years). Thurston sought review in this Court, which summarily vacated the judgment and remanded following its *Booker* decision. 543 U.S. 1097 (2005).

On remand, a different sentencing judge[13] held a searching two-day hearing. At the conclusion, the court decided to impose the original 6-month split sentence, carefully explaining his reasons. Significantly, the court concluded that the sentence it imposed on Thurston was "sufficient and no more than necessary to serve the statutory purposes" of § 3553(a). *See* Thurston Pet. App. at 188a, No. 06-378 (*cert. pending*). This sentence apparently outraged the prosecutors yet again and the government appealed Thurston's sentence for a second time.

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[13] The original judge recused himself from the case on remand, apparently due to his disgust for the harsh and inflexible Guidelines.

The First Circuit reviewed Thurston's sentence this time for reasonableness under the post-*Booker* voluntary guidelines and reversed Thurston's sentence again. The court of appeals held that the sentence was unreasonable, in part, because in the court's view, the Guidelines -- which called for a sentence that was much longer than the statutory maximum for a first offender --- is an "important consideration" for a sentencing court because it has the "imprimatur" of an allegedly "expert agency." 456 F.3d 211, 215 (1st Cir. 2006). The court of appeals reversed Mr. Thurston's sentence for a second time. It further held that any sentence imposed on remand that falls below a three-year prison term (an effective pre-Guideline sentence of *9 years*), would be unreasonably lenient and, presumably, would be reversed yet again. *Id.* at 220. Astonishingly, the court of appeals further opined that if it were the sentencing authority, it would impose a sentence "at or near" the statutory maximum term of five years.[14] *Id.* Mr. Thurston's second petition for certiorari from that judgment is pending before this Court.

Congress provided that the maximum prison sentence for Thurston's crime should be five years in prison. Yet the Guidelines dictated a 78 to 97 month sentence for Thurston, a first-offender. Applying an uncapped Guideline sentence in that case would result in a sentence that would

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[14] Not only do the Guidelines dictate a patently harsh and unreasonable sentence, they run directly counter to Congress's direction to the Commission that "a term of imprisonment at or near the maximum term authorized for categories of defendants" be reserved for the class of thrice-convicted felons who have been convicted of crimes of violence and/or certain drug offenses. 28 U.S.C. § 994(h). Mr. Thurston, a pillar in this community, is a first-offender who was not convicted of a crime of violence or drug offense.

be approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case for the underlying object of the conspiracy. In short, the statutory *maximum* sentence that *could* be imposed, became the mandatory *minimum* sentence that were called for by the Guidelines.

The imposition of statutory maximums as mandatory minimums also occurs in certain environmental cases, particularly for those which are classified as misdemeanors, and hence, have a statutory maximum term of one year. Again, non-violent first offenders found guilty of a minor regulatory infraction find themselves sentenced to the statutory maximum prison term of one year because the unreasonable Guidelines call for a sentence even greater than that. *See* B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990). *See also United States v. Maul*, 2006 U.S. App. LEXIS 27979 (7th Cir. 2006) (defendant charged with a Class A misdemeanor for merely "struggl[ing] with two federal officers" as they were arresting him pleaded guilty and received the statutory maximum sentence of one year because Guidelines would require a 30-37 month sentence due to his criminal history score, and because a guideline sentence is "presumptively reasonable").

C. The Guidelines Are Flawed Because They Spawn, Rather Than Reduce, Sentencing Disparities.

One of the primary purposes of the Guidelines was to reduce perceived unwarranted disparity in sentencing. As one commentator noted:

> Of all the problems that inspired Congress to establish guidelines, none was as urgent as inconsistency in sentencing. 18 U.S.C. 3553(a)(6) lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the primary sentencing considerations. The guidelines reflect this commitment in the opening policy statement. The goal of uniformity is no less pressing simply because two defendants happen to be joined in the same case. *In fact, similarly situated defendants accused of the same crime so clearly deserve similar punishments that they present test cases for the legitimacy of the guidelines.*[15]

Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 Fed. Sent. R. 116 (1993) *available at* 1993 WL 561438 (footnote omitted) (emphasis

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[15] As the Sentencing Commission itself recognized:

> *The guidelines seek fairness*, which is the establishment of sanctions proportionate to the severity of the crime and *the avoidance of unwarranted disparity, by setting similar penalties for similarly situated offenders*.
>
> * * * *
>
> Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public.

U.S. Sentencing Comm'n, 2002 ANNUAL REPORT 1 (emphasis added). Indeed, an empirical study of pre- and post-Guideline sentences conducted by the Department of Justice's Bureau of Justice Statistics suggests that disparities in sentencing of different racial or ethnic groups may have *increased* under the Guidelines. Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 124 (1998).

added).

If the reduction of sentencing disparities of defendants accused of the same crime present the "test case" to assess the legitimacy of the Guidelines, they clearly flunk that test. The previously discussed *Thurston* case is also Exhibit A in demonstrating the failure of the Guidelines to reduce disparity. As noted, both defendants were charged with the same offense for essentially the same conduct. If anything, Thurston's co-defendant was *more* culpable. But because Thurston exercised his constitutional right to trial, his Guideline sentence was the statutory maximum of five years, whereas his co-defendant received probation.

In *Thurston*, the government argued that departures from the guidelines on the basis of sentencing disparity are only justified based on *nationwide* disparities, rather than intra-case or co-defendant disparities. This argument is absurd on its face, for it tolerates gross disparities in the very same case for the very same conduct, and thus, contravenes one of the primary reasons for having the Guidelines in the first place.

In addition, *amici* note that many courts and commentators have expressed serious misgivings about the Guidelines' inflexibility in the pre-*Booker* era for dealing with unwarranted disparities in sentences. *See* James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2347 (1998).[16] Departing from the Guidelines in cases such as this not only would further Congress's intent of reducing disparities, but also would

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[16] See also Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale. L.J. 1681, 1723-24 (1992).

bring transparency into the sentencing process which will promote public confidence in the integrity of the judicial system.

> Permitting judges to depart on the basis of unjustified disparity among codefendants could have salutary consequences beyond improving the fairness of the sentences at hand. It could lead to a richer and more honest discussion of the underlying purposes of sentences and how they are -- or are not -- served by the current structure of the Guidelines.

Id. at 2350. Those salutary public policy goals can now be fully realized in the post-*Booker* era, provided that the Guidelines are not given a "presumption of reasonableness." *See, e.g., United States v. Lazenby*, 439 F.3d 934 (8th Cir. 2006) ("district court gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators. . . . [E]xtreme disparity in these two sentences not only fails to serve the legislative intent reflected in § 3553(a)(6), but it also suggests an arbitrary level of decision-making that fails to 'promote respect for the law,' § 3553(a)(2)(A).").

D. The Guidelines Are Flawed Because They Do Not Properly Provide for Probation And Violate Congress's Command To Reduce The Likelihood of Prison Overcrowding.

The Guidelines are also flawed and are unworthy of a presumption of reasonableness because the Sentencing Commission violated the Congressional directive that the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity

of the Federal prisons . . . ." 28 U.S.C. § 994(g). In fact, the Guidelines appear to have been formulated to *maximize* the likelihood that the prison population would exceed the capacity of federal prisons. Because the flawed Guidelines routinely generate unduly harsh prison sentences, federal prison population has far exceeded its capacity by over 40 percent. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7.

One of the sentencing factors that courts are required to consider is the "kind of sentences available," § 3553(a)(3). In addition to incarceration, for which the Guidelines are heavily skewed, there are a variety of sentencing options available to a sentencing judge, such as probation (supervised or unsupervised); home confinement (including electronic monitoring, visitor restrictions, and other conditions deemed appropriate)[17]; halfway houses, community service, restitution, forfeiture, and monetary fines, or a sentencing package involving a mixture of all these sanctions.

Unfortunately, many of these sentencing options are unavailable in many Guideline cases, even though a suspended sentence with probation comports with the parsimony provision. Violations of any of the numerous conditions of probation (*e.g.*, drug testing, employment, restitution, and community service) will trigger probation revocation proceedings, and if warranted, incarceration will follow. On the other hand, errors for imposing excessive prison terms in violation of the parsimony provision cannot

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[17] For a good description of the costs and benefits of home confinement, see Paul J. Hofer and Barbara S. Meierhoefer, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, Federal Judicial Center (1987).

be corrected because parole has been abolished.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be reversed.

Respectfully submitted,

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Date: December 18, 2006

APPENDIX

GUIDELINES FOR DECISIONMAKING

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense Characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1998) Very good (10 to 8)	Good (7 to 6)	Fair (5 to 4)	Poor (3 to 0)
	Guideline range (months)			
Category:				
1	[</=]=4	[</=]=8	8-12	12-16
2	[</=]=6	[</=]=10	12-16	16-22
3	[</=]=10	12-16	18-24	24-32
4	12-18	20-26	26-34	34-44
5	24-36	36-48	48-60	60-72
6	40-52	52-64	64-78	78-100
7	52-80	64-92	78-110	100-148
8	100+	120+	150+	180+

Source: 28 C.F.R. 2.20 Paroling policy guidelines (footnote omitted)

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 06–5618

MARIO CLAIBORNE, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 4, 2007]

PER CURIAM.

The Court is advised that the petitioner died in St. Louis, Missouri, on May 30, 2007. The judgment of the United States Court of Appeals for the Eighth Circuit is therefore vacated as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

It is so ordered.